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Sup. Court

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 199 89

FRED A. McMASTER, ADMINISTRATOR OF THE ESTATE OF F. E. McMASTER, DECEASED, PETITIONER,

vs.

THE NEW YORK LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED FEBRUARY 6, 1900.
CERTIORARI AND RETURN FILED APRIL 4, 1900.

(17,637.)

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INDEX.

	Page.
Caption	*a*
Transcript from U. S. circuit court, northern district of Iowa	1
Transcript from district court of Woodbury county, Iowa	1
Petition	1
Exhibit A—Policy of insurance	6
Answer	15
Petition for removal to Federal court	15
Bond for removal	16
Order of removal	18
Clerk's certificate to transcript	18
Amended and substituted answer	19
Reply	21
Amendment to substituted answer	23
Reply to amended and substituted answer	24
Amendment to amended and substituted answer	26
Amendment to petition	27
Amendment to petition	28
Amendment to reply	29
Answer to amendments to petition	30
Stipulation waiving jury	31

Page
Findings of fact 31
Opinion of the court 35
Record entry of findings of fact 52
Judgment 56
Bill of exceptions 56
Findings of fact 56
Exception to court's refusal to enter judgment for plaintiff 60
Exception to judgment 60
Certificate of judge to bill of exceptions 60
Assignment of errors 61
Petition for and order allowing writ of error 62
Bond on writ of error 63
Precipe for transcript 64
Writ of error 65
Clerk's return to writ of error 66
Citation and admission of service 67
Clerk's certificate to transcript 68
Appearance for plaintiff in error 69
Appearance for defendant in error 69
Order of submission 70
Opinions of circuit court of appeals 71
Statement of case 71
Opinion, Sanborn, J. 74
Opinion, Thayer, J., concurring 83
Opinion, Caldwell, J., dissenting 84
Judgment of circuit court of appeals 102
Petition for rehearing 103
Order denying petition for rehearing 131
Certificate of clerk to transcript 131
Writ of certiorari 132
Return to writ of certiorari 132

a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, A. D. 1899, thereof, begun and held at the United States Court Room in the City of St. Louis, Missouri, on the first Monday in December, it being the fourth day of December, A. D. 1899, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn and Honorable Amos M. Thayer, Circuit Judges.

United States Circuit Court of Appeals, Eighth Circuit.

Attest:
JOHN D. JORDAN,
CLERK U. S. CIRCUIT COURT
OF APPEALS EIGHTH CIRCUIT.

Be it remembered, that heretofore, to wit, on the third day of January, A. D. 1899, a transcript of record in pursuance of the Writ of Error directed to the Circuit Court of the United States for the Northern District of Iowa, was filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, in a certain cause wherein Fred A. McMaster, Administrator of the Estate of F. E. McMaster, Deceased, was Plaintiff in Error, and The New York Life Insurance Company, Defendant in Error, which said transcript of record is in the words and figures following, to wit:

1 The United States of America,
Northern District of Iowa—ss.

Pleas before the Circuit Court of the United States in and for the Northern District of Iowa, Western Division, at a term begun and holden at Sioux City in said District on the first Tuesday of October, A. D. 1895, before the Honorable O. P. Shiras, Judge of the Northern District of Iowa.

Fred A. McMaster, Administrator of the Estate of F. E. McMaster, deceased, Plaintiff,
vs. No. 317 Law.
The New York Life Insurance Company, Defendant.

Be it remembered, that heretofore, to wit, on the 4th day of October, A. D. 1895, there was filed in the foregoing entitled cause, a transcript from State Court for Woodbury County, Iowa, the said transcript being filed in the office of the Clerk of the United States Circuit Court in and for the Northern District of Iowa, Western Division, which transcript is in the words and figures following, to wit:

2 In the District Court of Iowa in and for Woodbury County.

Fred A. McMaster, Administrator of the Estate of Frank E. McMaster, deceased, Plaintiff,
vs.
New York Life Insurance Company, Defendant.

PETITION.

Count I.

Plaintiff for cause of action states:

That on or about the 5th day of February, 1895, he was appointed administrator of the estate of Frank E. McMaster, deceased; that letters of administration were issued from the Probate Court, of the District Court of Woodbury County, Iowa, to said Fred McMaster.

That the defendant, the New York Life Insurance Company, is a corporation duly organized under the laws of the State of New York, and is now, and was at all the times hereinafter mentioned, engaged in the life insurance business in the State of Iowa.

That on the 12th day of Decemer, 1893, Frank E. McMaster, deceased, made a written application to the New York Life Insurance Company for five policies of life insurance of one thousand dollars ($1000) each; and that said defendant, the New York Life Insurance Company, executed on the 18th of December and delivered to the said Frank E. McMaster, deceased, on the 25th day of December, 1893, five policies of life insurance, numbered, 577,242,-3,-4,-5,- and 6 respectively of one thousand dollars ($1000) each, on the life of said Frank E. McMaster, deceased; wherein and whereby said defendant undertook and promised to pay, upon the death of said Frank E. McMaster, on said five policies, five thousand dollars ($5000), during the continuance of said policies; a copy of said policies and the written application for insurance is hereto attached, marked Exhibit "A", and made a part hereof; that on or about the 25th day of December, 1893, each of said policies heretofore mentioned were executed and delivered to said Frank E. McMaster, deceased, and the premium paid on or about the same time, said premium being the regular rate charged by said defendant for a year's insurance. That said policies provide that all policies which may be issued under the application for insurance shall not be in force until the actual demand and acceptance of the premium by said company or its authorized agent. That the authorized agent received said premium, as stated, on or about the 25th day of December, 1893. That said policies also provide that after said policies shall have been in force for three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5% per annum for the number of days for which the premium remains due and unpaid. During the said month of grace, the unpaid premium, with interest, as above, remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance; that on the morning of the 18th day of January, 1895, said Frank E. McMaster died of pneu-
3 monia. That the defendant herein was furnished with proofs of the death of said Frank E. McMaster, and the payment of the five thousand dollars ($5000), as provided by said five policies, was demanded by plaintiff. That said defendant has refused and still refuses to pay to the plaintiff herein the five thousand (5000) dollars, agreed and stipulated in said policies of insurance or any part thereof, and that the sum of five thousand dollars ($5000) is still due and owing to this plaintiff from the defendant herein.

That at the time of the death of the said Frank E. McMaster, he had performed each and every condition of said policies as required of him to be performed.

Wherefore, plaintiff demands judgment against the defendant herein for the sum of five thousand dollars ($5000.00), with interest thereon, from the .. day of ....., 1895, and the costs of this action.

Count II.

That on or about the 5th day of Feb., 1895, plaintiff was appointed administrator of the estate of Frank E. McMaster, deceased. That letters of administration were issued from the Probate Court of the District Court of Woodbury County, Iowa, to the said Fred A. McMaster.

That the defendant, the New York Life Insurance Company, is a corporation duly organized under the laws of the State of New York, and is now, and was at all the times hereinafter mentioned, engaged in the life insurance business in the State of Iowa.

That on the 12th day of December, 1893, Frank E. McMaster made a written application for life insurance in the New York Life Insurance Company. That at the time of signing said written application for life insurance, the words, "Please date policy same as application," were not written in said application for insurance, but that said words were written in by the agent of the New York Life Insurance Company, F. W. Smith, after said Frank E. McMaster, deceased, had signed said application, and without the knowledge or consent of Frank E. McMaster, deceased; that said defendant, the New York Life Insurance Company, executed on the 18th of Dec., and dlivered to the said Frank E. McMaster, deceased, on the 25th day of December 1893, five policies of life insurance, numbered 577242, 3,-4,-5,- and 6, respectively, of one thousand dollars ($1000) each, on the life of said Frank E. McMaster, deceased; wherein and whereby said defendant undertook and promised to pay upon the death of said Frank E. McMaster, on said five policies, five thousand dollars ($5000.00), during the continuance of said policies. Exhibit "A," attached in Count 1, is hereby made a part of Count II, except the part of said exhibit in the written application which states, "Please date policy same as application."

That on or about the 25th day of December, 1893, each of said policies heretofore mentioned, were executed and delivered to said Frank E. McMaster, deceased, and the premium paid on or about the same time, said premiums being the regular rate charged by said defendant for a year's insurance; that said policies provided that all policies which may be issued under the application for insurance shall not be in force until the actual demand and acceptance of the premium by said company or its authorized agent. That the authorized agent re-

ceived said premiums, as stated, on or about the 25th day of December, 1893; that said policies also provided that after said policies shall have been in force for three months, a
4 grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5% per annum for the number of days for which the premium remains due and unpaid. During the said month of grace the unpaid premiums, with interest as above, remain an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amounts of the insurance. That on the morning of the 18th day of January, 1895, the said Frank E. McMaster died of pneumonia. That the defendant herein was furnished with proofs of the death of the said Frank E. McMaster, and the payment of the five thousand dollars ($5000.00), as provided by said five policies, was demanded by plaintiff.

That said defendant has refused, and still refuses to pay to the plaintiff herein the five thousand dollars ($5000) as agreed and stipulated in said policies of insurance, or any part thereof, and that the sum of five thousand dollars ($5000) is still due and owing to this plaintiff from the defendant herein.

That at the time of the death of the said Frank E. McMaster, he had performed each and every condition of said policies as required of him to be performed.

Wherefore, plaintiff demands judgment against the defendant herein for the sum of five thousand dollars ($5000), with interest thereon from the .. day of ....., 1895, and costs of this action.

Count III.

The plaintiff further states that on or about the 5th day of February, 1895, plaintiff was appointed administrator of the estate of Frank E. McMaster, deceased, and that he is the duly authorized administrator of said estate.

That the defendant, the New York Life Insurance Company, is a corporation duly organized under the laws of the State of New York and is now, and was at all the times hereinafter mentioned, engaged in the life insurance business in the State of Iowa.

That on the 12th day of December, 1893, Frank E. McMaster, deceased, made a written application for life insurance in the New York Life Insurance Company. That said defendant, the New York Life Insurance Company, signed the policies hereinafter mentioned, on the 18th day of December, 1893, and delivered the same to the said Frank E. McMaster, deceased, on the 25th day of December, 1893, being five policies of life insurance

numbered 577,242,-3,-4,-5, and 6, respectively of one thousand dollars each, on the life of said Frank E. McMaster, deceased. Wherein and whereby the said defendant undertook and promised to pay on the death of said Frank E. McMaster, on said policies, five thousand dollars ($5000.00).

That said policies continued in force from the 25th day of December, 1893, for thirteen (13) months, by reason of the payment of one year's premium, and by reason of the provisions and conditions of said policies, providing for one month of grace, and by reason of the understanding of said parties, that said policies, by the payment of said premium, as hereinbefore stated, would be in force for thirteen (13) months, from the 25th day of December, 1893. Exhibit "A" attached in Count I, is attached hereto and made a part of Count III, and for the further reason that said policies were delivered to Frank E. McMaster, deceased, on the 25th day of December, 1893, and the premium paid on or about the same time, said premium being the regular rate charged by said defendant for a year's insurance. That said policies provided that all policies which may be issued under the application for insurance, shall not be in force until the actual demand and acceptance of the premium by said company or its authorized agent; that the authorized agent received said premium, as stated, on or about the 25th day of December, 1893.

That on the morning of the 18th day of January, 1895, the said Frank E. McMaster died of pneumonia. That the defendant herein was furnished with proofs of the death of the said Frank E. McMaster, and the payment of the said five thousand dollars ($5000) as provided by said five policies of insurance, was demanded by plaintiff. That said defendant has refused and still refuses to pay plaintiff herein the five thousand dollars ($5000) as agreed and stipulated in said five policies of insurance, or any part thereof, and that the sum of five thousand dollars ($5000) is still due and owing to this plaintiff from the defendant herein.

That at the time of the death of the said Frank E. McMaster he had performed each and every condition of said policies, as required of him to be performed.

Wherefore plaintiff demands judgment against the defendant herein for the sum of five thousand dollars ($5000) with interest thereon from the ..... day of ..... 1895, and the costs of this action.

F. E. GILL,
Attorney for Plaintiff.

Filed Jun. 13, 1895. W. S. Belden, Clerk.

6

EXHIBIT A.

Amount $1000

Number 512,382 The New York Life Insurance Company, by this Policy of Insurance,

Doth Promise and Agree

Age 26. to pay one thousand dollars, at its office in the City of New York, to the insured's executors, administrators or assigns, immediately upon receipt and approval of proofs of the death during the continuance of this policy of Frank E. McMaster, of Sioux City in the County of Woodbury, State of Iowa (herein called the insured).

Annual Premium $21.00. This contract is made in consideration of the written application for this policy, and of the agreements, statements and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and .... cents, to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy.

Incontestability. After this policy shall have been in force one full year, if it shall become a claim by death the Company will not contest its payment, provided the conditions of the policy as to payment of premiums have been observed.

Examined T. H. M.

The benefits and provisions placed by the Company on the next page, are a part of this contract, as fully as if recited over the signatures hereto affixed.

In witness whereof, the said New York Life Insurance Company has, by its duly authorized officers, signed and delivered this contract this eighteenth day of December one thousand eight hundred and ninety-three.

JOHN A. McCALL,
President.

Ordinary Life Accumulation.

CHARLES C. WHITNEY,
Secretary.

7

Benefits and Provisions Referred to in This Policy.

Benefits at end of Accumulation period.

If the insured is living on the 12th day of December in the year nineteen hundred and thirteen, on which date the accumulation period of this policy ends, and if the premiums have been paid in full to said date, the insured shall be entitled to one of the six benefits following:

First. To continue the policy and receive the dividend then apportioned by the Company, either
(1) in cash, or
(2) in an annuity to be used in reduction of premiums, or to be taken in cash, or
(3) in additional paid up insurance, conditioned upon satisfactory re-examination.

Second. To exchange the policy for its entire value, as stated below (*), either
(4) in cash; or
(5) in an annuity for life; or
(6) in a paid-up policy. (No re-examination required.)

*(The said entire value of the policy consists of the guaranteed reserve, two hundred and thirty-nine ($239) and in addition thereto the dividend then apportioned by the Company.

The insured shall notify the company in writing, prior to the end of the accumulation period; which benefit is selected. Failing such notification the apportioned dividend shall be applied to the purchase of an annuity as stipulated in benefit (2) above.

Dividends.

No dividend shall be apportioned or paid on this policy, before the end of the accumulation period. If this policy is continued in force beyond the accumulation period, and if all premiums due have been paid, a dividend will be apportioned to the insured at the end of each period of five years thereafter.

Advances within Accumulation Period.

The Company will make advances as loans upon this policy at the fifth, tenth, and fifteenth anniversaries of the insurance, under the following conditions:

First. That premiums are paid in full to the time when the [load] is made, including the premium for the entire insurance year then beginning.

Second. That the aggregate amount of loans outstanding from the sixth to the tenth years inclusive shall not exceed $47, from the eleventh to the fifteenth years inclusive, shall not exceed $102; and from the sixteenth to the twentieth years, inclusive, shall not exceed $166.

Third. That the policy shall be duly assigned to the company as collateral security for the loans and deposited at the home office.

Fourth. That interest at the rate of five per cent per annum shall be paid upon all such loans at the anniversary of the insurance next succeeding, and annually thereafter until the loans are paid off.

8

Fifth. That the loans shall be for such time as the borrower may elect, not longer however, than to the end of the accumulation period.

(Any indebtedness to the Company, including any balance of the current year's premium remaining unpaid, will be deducted in any settlement of this policy or of any benefits thereunder.)

Powers not Delegated.

No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise or making or receiving any representation or information. These powers can be exercised only by the president, vice-president, second vice-president, actuary, or secretary of the Company, and will not be delegated.

Payment of Premiums.

All premiums are due and payable at the home office of the Company, unless otherwise agreed in writing, but may be paid to agents producing receipts signed by the president, vice-president, second vice-president, actuary or secretary, and countersigned by such agent. If any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall remain the property of the company.

Grace. After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5% per annum for the number of days during which the premium remains due and unpaid. During the said month of grace, the unpaid premium with interest as above, remains an indebtedness due the Company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance.

Proofs of Death. Within one year after the death of the insured the Company must be furnished at the office in the City of New York, with proofs of death, which shall comprise satisfactory statements establishing the claim. Such statements must comply fully with the company's present forms. If it is found that the age of the insured was understated in the application, the amount of insurance payable shall be such proportion of the amount of the policy as the premium paid bears to the required premium at the true age.

Assignments. Any assignment of this policy must be made in duplicate, and both copies must be sent to the policy, paid-up insurance will be issued for the Company. The company has no responsibility for the validity of any assignment.

Non-forfeiture. After this policy shall have been in force three full years, in case of non-payment of any premium subsequently due and upon the payment within thirty days thereafter of any indebtedness to the company on account of this policy, and provided the policy has not been terminated by death within the month of grace allowed in the payment of the premiums (1) the insurance will be extended for the face amount as provided in the table below; or (2) on demand made within six months after such non-payment of premium due, with surrender of this policy paid-up insurance will be issued for the reduced amount provided in the said table; or (3) the policy will be reinstated within the said six months upon payment of the overdue premium with interest at the rate of five per cent per annum, if the insured is shown by evidence satisfactory to the Company to be in good health.

9

Table of guarantees, if payment of premiums is discontinued, provided there is no indebtedness against the policy, (pursuant to the insurance law (chapter 690, laws of 1892 of the State of New York).

If the premiums are paid—	(1) The insurance of $1000 (without participation in profits) will be extended—	or (2) The policy may be converted into non-participating paid-up insurance
to Dec. 26, 12, 1896	to March 12 May 26th, 1899	of $64 67
" " " " 1897	to June,..... 1901	of 84 90
" " " 1898	to Aug. April... 1903	of 105 114
to " " 1899	to July March.. 1905	of 126 137
" " " 1900	to " Feb..... 1907	of 147 160
" " " 1901	to Aug. Jan.... 1909	of 169 183
" " " 1902	to " Dec..... 1910	of 190 206
" " " 1903	to " " 19132	of 212 229
" " " 1904	to July " 19154	of 233 252
" " " 1905	to May " 19176	of 255 275
" " " 1906	to Feb. Oct.....19198	of 276 297
" " " 1907	to Oct. Aug..... 1920	of 298 320
" " " 1908	to Apl. Apl..... 1922	of 319 342
" " " 1909	lo Oct. Nov..... 1923	of 340 364
to " " 1910	to Feb. May.... 1925	of 361 386
" " " 1911	to May Oct..... 1926	of 382 408
" " " 1912	to Aug. Feb....19278	of 403 429

Policies continued in force beyond the accumulation period will be entitled in case of non-payment of any premium subsequently due, to extended insurance or reduced paid-up insurance, on the same basis as that on which the above table is constructed.

10 Abstract (E. and O. E.) of the application for insurance in the New York Life Insurance Co.

1. Name (in full) of the person applying for insurance on his life. Frank E. McMaster.
2. A. Residence, State Iowa; County, Woodbury; Town, Sioux City; Street, 1008 Ia. street.
   B. Place of business; 503 Ia. Savings Bank, Sioux City, Ia.
3. A. Occupation or employment; if more than one, state all. A. Atty. at law.
   B. Are you married? No.
   Note: It is not a sufficient answer to state (for example) "merchant," mechanic," "salesman" or "clerk," the particular branch of business or trade is to be specified and full particulars given, especially where the occupation is in any way hazardous.
4. A. Place of birth, Cal. B. Race or nationality, white. C. Born on 10 day of July, 1867. D. Age nearest birthday, 26.

5. If you have any insurance on your life, state in what companies, when taken, the kinds of policies and their respective amounts.
Answer: I have no insurance except $3000 in New York Life Ins. Co.

6. A. Has any proposal or application to insure your life ever been made to any company or agent, upon which a policy has not been issued as applied for?
B. If so, when, to what company, etc.?
For answer to other queries see copy with policy No. 582,256.

7. A. To whom is the insurance applied for to be payable in event of death? (Name in full:) Myself.
B. Present residence. C. Relationship to you.

8. If the application is for an endowment or limited endowment policy, to whom is the endowment to be payable at its maturity?
Note: This question refers only to policies issued on the endowment or limited-endowment premium-tables, not to policies issued on any life table.

9. A. Do you desire a policy on the "accumulation policy" plan as set forth in that policy form? Yes.
B. If so which accumulation period do you select? I select the 20-year accumulation period.
C. Do you desire a policy with "premium return" in case of death within the accumulation period? No.
D. If so is such return to be equal to one-half or all the premiums paid? Equal to .... premiums paid.

10. Sum to be insured $5000.
Five policies of $1000.00 each.
Please date policy same as application.

Premium payable) Annually.) Semi-annually.) Quarterly.

11 Note: Strike out the rates not desired.

On what table) Ordinary Life.) Life premium.) Endowment payable in ..... years.) Limited endowment payable in .... years.

I do hereby agree as follows: 1. That the statements and representations contained in the foregoing application, together with those contained in the declaration made by me to the medical examiner, shall be the basis of the contract between me and the New York Life Insurance Company; that I hereby warrant the same to be full, complete and true, whether written by my own hand or not; this warrant being a condition precedent to and a consideration for the policy which may be issued hereon. 2. That inasmuch as only the officers at the home office

of said company, in the City of New York, have authority to determine whether or not a policy shall issue on any application and as they act on the written statements and representations referred to, no statements, representations, promises or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, promises or information be reduced to writin- and presented to the officers of said company, at the home office in this application. 3. That in any distribution of surplus or profits, the principles and methods which may be adopted by said company for such distribution, and its determination of the amount equitably belonging to any policy which may be issued under this application, shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest under such policy. 4. That any policy which may be issued under this application shall not be in force, until the actual payment to and acceptance of the premium by said company, or an authorized agent, during my lifetime and good health. 5. That the contract contained in such policy and in this application, shall be construed according to the law of the State of New York, the place of said contract being agreed to be the home office of said company in the city of New York. 6. That no suit shall be brought against said company under said contract after the lapse of two years from the time when the cause of action accrues.

Dated at Sioux City, Ia., this 12th day of Dec., 1893.

Signature of person applying
for insurance on his life.
(Write the name in full.)

Frank E. McMaster.

Witness,
Agent, F. W. Smith.
93-63.

12 Declarations made to the Medical Examiner of the New York Life Insurance Company.

1. Have you had, since childhood, any of the following complaints? Answer (yes or no) opposite each.

Apoplexy—No.	Insanity—No.
Asthma—No.	Jaundice—No.
Bilious Colic—No.	Paralysis—No.
Cancer—No.	Piles—No.
Dropsy—No.	Pleurisy—No.
Disease of brain—No.	Pneumonia—No.
Disease of kidneys—No.	Rheumatism—No.

Disease of liver—No. Scrofula—No.
Disease of lungs—No. Small-pox—No.
Disease of urinary organs—No. Spinal disease—No.
Fistula—No. Spitting or raising blood—No.
General Debility—No. Syphilis—No.
Gout—No. Yellow fever—No.

Give full particulars of any serious illness you may have had since childhood.

When were you last confined to the house by illness. How?

2. Have you ever had severe headache, vertigo, fits or any nervous or muscular trouble? No.

3. A. Are you subject to cough, expectoration, palpitation or difficulty of breathing?

b. Have you ever been? If so, to which, when, and full details? No.

4. Are you subject or predisposed to dyspepsia, dysentery or diarrhoea? No.

5. A. What is the name and residence of your physician?

b. When and for what have his services been required? No.

6. A. What other physician have you consulted?

B. When and what for? No.

7. A. Has any proposal or application to insure your life ever been made to any company or agent, upon which a policy has not been issued as applied for?

B. If so, when, to what company, etc.? No.

8. Has any physician given an unfavorable opinion upon your life with reference to life insurance? If so state particulars? No.

9. The medical examiner must obtain full and clear answers to each of the following queries. Avoid

13 all indefinite terms:

	Age, if living.	Condition of Health.	Age at Death.	Cause of Death	How Long Ill.	Previous Health
Father	.....	.....	52	Ulceration of Stomach.	.....	Good.
Mother	58	Good.	.....	.....	.....	.....
Four Brothers	37, 32, 25, 16	All good.	.....	.....	.....	.....
Two Sisters	28, 21	Good.	.....	.....	.....	.....
Father's Father	.....	.....	70	Age.	.....	.....
Father's Mother	.....	.....	70	Age.	.....	.....
Mother's Father	.....	.....	65	Don't know.	.....	.....
Mother's Mother	.....	.....	65	Don't know.	.....	.....

10. A. Have any of the above or any of your uncles or aunts now or ever had, consumption, cancer, gout, scrofula, diabetes, rheumatism, epilepsy, insanity or any other hereditary disease? A. No.
    B. If so, give full particulars of each case. B.
11. A. Are your habits at the present time, and have they always been, sober and temperate? A. Yes.
    B. To what extent do you use intoxicating drinks as a beverage? (Average amount daily.) B. Not at all.
    C. Are you now engaged in any way in the retailing of alcoholic liquors? C. No.
    D. Have you ever been so engaged? D. No.
12. A. Where have you resided "during summer and winter" during each of the last ten years? Iowa, Ill. and Mich.
    B. Do you contemplate changing your place of residence or making a journey? (Yes or no.) B. No.
    If yes to what place and when?
13. A. How long have you been engaged in your present occupation? A. 2½ yrs.
    B. What was your business prior to your present occupation? B. Student.
    C. Do you contemplate making any change, temporary or permanent, in occupation? (Yes or no.) C. No.
    If yes, when and to what?

I hereby declare, that the accompanying application to the New York Life Insurance Company, dated Dec. 12th, 1893, for an insurance on my life, was signed by me, and that I renew and confirm my agreement therein; and I also agree that I expressly waive all provisions of law forbidding any physician or other person who has attended or examined me, from disclosing any knowledge or information which he thereby acquired.

FRANK E. McMASTER.

14 (The policy is endorsed on the back as follows:)

No. 512382. Exhibit "A'". New York Life Insurance Company. Assurance on the life of Frank E. McMaster, amount $1000. ....., Agent; Gilbert W. Smith, Manager, Sioux City, Iowa.

15 In the District Court of Iowa, in and for Woodbury County, August Term, 1895.

Fred A. McMaster, Administrator of the Estate of Frank E. McMaster, deceased, Plaintiff,

vs. Answer.

New York Life Insurance Company, Defendant.

The defendant says: that for answer to the plaintiff's petition in this action it denies each and every allegation therein contained.

Wherefore, it demands judgment for costs.

PARK & ODELL, Attorneys for Defendant.

Filed August 27, 1895. W. S. Belden, Clerk.

In the District Court of the State of Iowa in and for Woodbury County.

Fred A. McMaster, Administrator of the estate of Frank E. McMaster, deceased, Plaintiff.

vs. Petition for removal.

New York Life Insurance Co., Defendant.

To the Honorable District Court of the State of Iowa, in and for Woodbury County.

The petition of the New York Life Inurance Company, the defendant above named, respectfully shows to the Court:

First: That this is an action now pending in this Court, in which the above named Fred A. McMaster, administrator of the estate of Frank E. McMaster, deceased, is plaintiff, and the above named New York Life Insurance Company is defendant.

Second: That this action was commenced on the 6th day of May, 1895, by service upon the defendant of the original notice herein.

Third: That your petitioner appeared in this action by its attorneys; that the time required by the laws of this state to answer the petition has not yet expired.

Fourth: That this is an action founded upon an alleged liability upon contract, to wit: upon five certain policies of life insurance, alleged to have been made by your petitioner, aggregating the sum of five thousand dollars ($5000), and the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars ($2000.00), as appears by the petition herein.

Fifth: That this action involves a controversy between citizens of different states; that the plaintiff, Fred A. McMaster, administrator of the estate of Frank E. McMaster, de-

16 ceased, resided at the time of the commencement of this action, and still resides, in the City of Sioux City, in the County of Woodury, and State of Iowa, and said Fred A. McMaster, administrator of the estate of Frank E. McMaster, deceased, was, at the commencement of this action and still is, a citizen of the State of Iowa. That your petitioner, New York Life Insurance Company, is a corporation duly organized under the laws of the State of New York, and is now, and was at all the times hereinafter mentioned, a corporation under and by virtue of the laws of the State of New York, that its principal place of business and home office and residence was, at the time of the commencement of this action, and is still, in the City of New York, in the County of New York, and State of New York, and that said New York Life Insurance Company was at the time of the commencement of this action, and still is, a corporation of the City of New York, and State of new York, and is a corporation [credited] by the laws of said state and no other state.

Sixth: That your petitioner offers herewith a bond with good and sufficient surety for its entry in the Circuit Court of the United States for the Northern District of Iowa, Western Division, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this action was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays that this action may be removed into the Circuit Court of the United States for the Northern District of Iowa, Western Division, and that this Court proceed no further in this action.

PARK & ODELL, Attorneys for Defendant.

State of Iowa,
Polk County—ss.

W. E. Odell, being duly sworn, says that he is one of the attorneys for the defendant herein; that the foregoing petition is true to the knowledge of the deponent, except as to matters therein stated on information and belief and as to those matters deponent believes it to be true; that the reason why this affidavit is made by deponent and not by said petitioner, is that said petitioner resides, or is at present, without this state.

W. E. ODELL.

Sworn to before me and subscribed in my presence by the said W. E. Odell, this 23rd day of August, A. D. 1895.

SUE H. VAN LIEW,
Notary Public in and for Polk County, Iowa.

Filed August 27th, 1895. W. S. Belden, Clerk.

17 Know all men by these presents: That we, the New York Life Insurance Company, of the City of New York, County of New York, and State of New York, and J. G. Rounds, of the City of Des Moines, and State of Iowa, are held and firmly bound to Fred A. McMaster, administrator of the estate of Frank E. McMaster, deceased, of the City of Sioux City, County of Woodbury, and State of Iowa, their executors, administrators and assigns in the sum of two hundred and fifty dollars, lawful money of the United States of America, for which payment well and truly to be made, we do jointly and severally bind ourselves, our heirs, executors, administrators and assigns.

In witness whereof, we hereunto set our respective hands and seals this 22nd and 24th days of August, in the year of our Lord one thousand eight hundred and ninety-five.

Now the condition of the above obligation is such, that whereas, the above bounden New York Life Insurance [--] is about to file in the District Court of the State of Iowa, in and for Woodbury County, a petition for the removal into the Circuit Court of the United States for the Northern District of Iowa, Western Division, of a certain suit now pending in said District Court of the State of Iowa, in and for Woodbury County, wherein Fred A. McMaster, administrator of the estate of Frank E. McMaster, deceased, is plaintiff, and New York Life Insurance Company is defendant; now if the said New York Life Insurance Company shall enter into said Circuit Court of the United States on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said Circuit Court, if said Court shall hold that said suit was wrongfully or improperly removed thereto, and shall appear in said Circuit Court of the United States and shall there enter special bail in said suit if special bail was originally requisite therein, then this obligation to be void, otherwise to remain in full force and effect.

[Seal] NEW YORK LIFE INSURANCE CO.
[Seal] By CHAS. C. WHITNEY, Secretary.

Sworn to and subscribed before me this 22nd day of August, 1895. JOHN E. MOONEY,
Notary Public, Kings Co. Certificate filed in New York Co.

J. G. ROUNDS, Surety.

State of Iowa,
Polk County—ss.

I, J. G. Rounds, being duly sworn, depose and say that I am a resident of Polk County, in the State of Iowa; that I am the owner of real estate within Polk County in the State of Iowa, not exempt from execution and exclusive of all encumbrances to the value of one thousand dollars ($1000).

J. G. ROUNDS.

Subscribed and sworn to by the said J. G. Rounds, be-
18 fore me and in my presence, this 24th day of August, A. D. 1895.

SUE H. VAN LEW,
[Seal] Notary Public, in and for Polk County, Iowa.

Bond approved August 27th, 1895. F. R. Gaynor, Judge.
Filed August 27th, 1895. W. S. Belden, Clerk.

State of Iowa,
Woodbury County.

Be it remembered, that in the District Court of the State of Iowa, in and for Woodbury County, a Court of record, having and exercising general original jurisdiction in civil, criminal and probate proceedings, the following, among other proceedings, were had, to wit:

Fred A. McMaster, Admr.,
vs. No. 13545.
New York Life Ins. Co.

And now at this time, to wit, August 27th, 1895, this cause coming on for hearing, the plaintiff appearing by his attorney, F. E. Gill, and the defendant by its attorneys, Park & Odell, and Swan, Lawrence & Swan, and thereupon the defendant files its answer, and at the same time files a petition for removal, asking that this action may be removed into the Circuit Court of the United States, and that this Court proceed no further with the same.

And the defendant having filed its bond with proper sureties, conditioned that it will enter said Court with this action, and that it will pay all costs if awarded by said Court against it, and the Court having inspected said petition and bond, and being fully advised in the premises, finds that they are in form provided by law; that said defendant is entitled to the relief demanded, and therefore approved said petition and bond.

It is, therefore, ordered and adjudged by the Court that this cause be removed to the Circuit Court of the United States for the Northern District of Iowa, Western Division, and that the record be forwarded to said Court, as required by the statute in such cases made and provided.

Read, approved and signed in open court.
(Srg.) F. R. GAYNOR, Judge.

State of Iowa,
Woodbury County.

19 I, W. S. Belden, clerk of the District Court of the State of Iowa in and for Woodbury county, hereby certify that the foregoing is a true and correct copy of all the pleadings and

record entry in cause entitled Fred A. McMaster, administrator of the estate of Frank E. McMaster, deceased, plaintiff, vs. New York Life Insurance Company, defendant, as full and complete as the same now appear on file and on record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 16th day of September, A. D. 1895.

[Seal]

W. S. BELDEN,
Clerk District Court.

Indorsed: No. 217 law. No. 13545 law. Fred A. McMaster, administrator, vs. New York Life Insurance Co. Pleadings and record entry. Filed Oct. 4, 1895. A. J. VanDuzee, Clerk.

20 And afterwards, to wit, on the 4th day of October, 1895, there was filed in the office of the clerk of said court in said cause, an amended and substituted answer, which is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Iowa, Western Division.

Fred A. McMaster, Administrator of the Estate of Frank E. McMaster, Deceased, Plaintiff,
vs.
New York Life Insurance Company, Defendant.

AMENDED AND SUBSTITUTED ANSWER.

To the Honorable Court aforesaid:

1.

Comes now the said defendant, and for an amended and substituted answer to the petition in this action says, that it denies generally each and every allegation in said petition contained, except those that are herein specially admitted, qualified or explained.

This defendant admits that said plaintiff was appointed administrator as alleged in said petition, and that letters of administration have been issued to him as such.

This defendant admits further that the said Frank E. McMaster deceased made a written application to said defendant for five policies of life insurance of one thousand dollars ($1000) each and and that said defendant executed and delivered to the said Frank E. McMaster, on the 12th day of December, 1893, five policies of $1000 each on the life of the said Frank E. McMaster, deceased.

2.

This defendant, for further answer, says that said application is dated the 12th day of December, 1893, and asked the issuing of five policies of $1000 each upon the life of the said Frank E. McMaster, deceased. Said application also contained a request that said five policies each should be issued, dated and take effect the same date as the application namely, the 12th day of December, 1893, and said request was complied with, and the policies were so issued.

This defendant grants to the insured in said defendant company a grace of one month on the payment of premiums, which extended the day of payment of premiums from December 12th, 1894, as in the policies issued to said Frank E. McMaster, deceased, late as the 12th day of January, 1895, but not later.

3.

This defendant for further answer says that payment of the premiums due upon said policies were not paid within the time prescribed as aforesaid, and that said Frank E. McMaster died on the 18th day of January, 1895, six days after said policies had lapsed and were forfeited for non-payment of premiums as required.

21 4.

For further answer this defendant says that notice was duly mailed to the insured at least fifteen days and not more than forty-five days before the said premiums were due upon said policies, and said notice stated the amount, and the date when the premiums on said policies were due, and that said policies would be forfeited if the premiums due on said policies were not paid within the time required.

5.

This defendant further answering says that by reason of the non-payment of the premiums due on said policies within the time prescribed by the conditions of said policies as aforesaid, all of said policies became lapsed, forfeited and void, and were so lapsed and forfeited before, and at the time of the death of the said Frank E. McMaster, deceased, and this defendant, therefore, is not liable for any amount whatever upon said policies.

6.

This defendant further answering said petition says that said application is a part of said policies, in each case, that said assured received and accepted said policies during his lifetime and had them all in his possession for a long time, and was aware and knew, or could have known, the contents in each policy.

That said assured had paid the premiums when said policies were delivered to him; that by reason of said assured's acceptance of said policies, his representative the plaintiff herein, is estopped from denying the date of said policies or claiming that said policies should have a different date from the application, and is estopped for the reasons above stated from claiming that said words, to wit: "Please date policy same as application" were not in said application when insured signed same, for by accepting said policies the assured waived said right to object, if said words were inserted, as alleged in petition after the signing of the application, which this defendant denies.

Wherefore, The defendant asks that the petition herein be dismissed, and that it have the costs of this action.

PARK & ODELL,
SWAN, LAWRENCE & SWAN,
Attorneys for defendant.

Indorsed: No. 217 law. In the Circuit Court of the United States, Northern District, Ia., Western Division. Fred A. McMaster Administrator etc. Plaintiff vs. New York Life Ins. Co. Defendant. Amended and substituted answer. Filed October 4th, 1895. A. J. Van Duzee, Clerk.

22 And afterwards to wit on the 5th day of October, 1895, there was filed in the office of the clerk of said Court in said cause a reply, which reply is in the words and figures following, to wit:

In the Circuit Court of the United States for Northern District of Iowa, Western Division.

Fred A. McMaster, Administrator of the estate of Frank E. McMaster, deceased, Plaintiff,
vs Reply.
The New York Life Insurance Co. Defendant.

To the Honorable Court aforesaid, comes now the plaintiff, and for reply to defendant's amended and substituted answer, denies each and every allegation therein contained, except as hereinafter admitted or otherwise replied to.

Plaintiff admits that he was appointed administrator, and that letters of administration issued to him as such, and admits that Frank E. McMaster, deceased, made a written application to defendant for five policies for life insurance of One Thousand (1000) dollars each, and that defendant executed and delivered said policies to deceased, but expressly denies that said policies or either of them were executed or delivered on the 12th day of December 1893.

Plaintiff expressly denies that said request, if ever made, "to date policies on the 12th day of December 1893" was complied with, and alleges that defendant refused so to do, if ever requested, and by dating said policy and signing it on the 18th day of December 1893, the defendant is estopped from claiming that said policies went into force on the 12th day of December 1893.

And replying to the third defense, set up by defendant, plaintiff expressly denies that said policies lapsed and were forfeited for non-payment of premiums; and for further reply to the fourth defense set up by defendant, plaintiff expressly denies that Frank E. McMaster, deceased, had notice that said policies would be forfeited if the premiums due on said policies were not paid, and denies the notice given if any was the notice required by the laws of the state of New York, as required by said policies, and further alleges that it was the common practice of defendant to receive premiums after they fell due, and after more than one month had elapsed for the time of giving notice to pay premiums.

Plaintiff further alleges that said defendant is estopped by its own failure to give the notice of the payment of premiums required, and by the acts of its agents from claiming that said policies have lapsed.

Wherefore plaintiff renews his demand for judgment against defendant, as prayed in his petition herein.

F. E. GILL, Atty. for Plaintiff.

Indorsed: No. 217 law. In the Circuit Court of the United States, Northern District of Iowa Western Division. Fred A. McMaster, Administrator of the estate of Frank E. McMaster deceased, Plaintiff vs The New York Life Insurance Company, Defendant. Reply. Filed October 5th, 1895. A. J.
23 Van Duzee, Clerk. By J. H. Bolton, Deputy.

And afterwards to wit, on the 24th day of April, 1896, there was filed in the office of the Clerk of said Court in said cause an amendment to substituted answer, which is in words and figures following, to wit:

In the Circuit Court of the United States Northern District, Iowa, Western Division.

Fred A. McMaster, administrator of the estate of Frank E. McMaster,

vs.

New York Life Insurance Co., Defendant.

Amendment to substituted answer.

Now comes the defendant, and by leave of the Court, files an amendment to its substituted answer by adding thereto the following:

The defendant further answering denies that there was any understanding or agreement between the parties that the said policy should be in force or the premiums should become due at any other time, manner or place, than as stated and expressed in said policy, nor was there any understanding or agreement that the said policy should be in force and binding for thirteen months from the 25th day of December, 1893, or any other time than that stated and expressed in the said policy. That it is expressly stipulated and agreed in said contract of insurance that the annual premiums therein should become due and payable on the 12th day of December of each and every year, and that after the said policy had been in force three months a grace of one month will be allowed in the payment of the premium and the policy should continue in force during the said month, and the said time of payment and conditions have never been changed, superseded or altered in any manner.

That the following provision in said contract are embodied therein and form a part of said contract of insurance:

No agent has power in behalf of the company to make or modify this or any contract of insurance to extend the time for paying a premium, to waive any forfeiture, or to bind the company by making or receiving any representation or information. These powers can be exercised only by the president, vice-president, second vice-president, actuary or secretary of the company, and will not be delegated.

All premiums are due and payable at the home office of the company unless otherwise agreed in writing, but may be paid to agents producing receipts, signed by the president, vice-president, second vice-president, actuary or secretary and countersigned by such agents. If any premium is not thus paid on or before the day when due, then (except as herein other wise provided) this policy shall become void, and all payments previously made shall remain the property of the company.

24 After this policy shall have been in force three months, a grace will be allowed of one month in payment of subsequent premiums; provided that in all cases when this grace is availed of interest at the rate of five per cent per annum shall be paid to the company for the time deferred. During the month of grace the policy remains in full force.

That the payments of the premiums have not been made or in any manner waived or changed as therein contracted and the said policy had prior to the death of the said Frank E. McMaster, become void.

PARK & ODELL,
SWAN, LAWRENCE & SWAN,
Attys. for deft.

Indorsed: Circuit Court of United States, Northern District of Iowa, Western Division. Fred A. McMaster, administrator of estate of Frank E. McMaster, vs. New York Life Insurance Company. Amendment to substituted answer. Filed April 24th, 1896. A. J. VanDuzee, Clerk, By J. H. Bolton, Deputy.

And afterwards, to wit, on the 25th day of October, 1896, there was filed in the office of the Clerk of said Court in said cause a reply to amended and substituted answer, and amendment to substituted answer, which is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Iowa, Western Division.

Fred A. McMaster, Administrator of the estate of Frank E. McMaster, deceased, Plaintiff,

vs.

New York Life Insurance Co., Defendant.

Reply to amended and substituted answer and amendment to substituted answer.

To the Honorable Court:

Comes now the plaintiff, and for reply to defendant's amended and substituted answer and amendment to substituted answer, denies each and every allegation contained in said answers except as hereinafter admitted or otherwise replied to.

Plaintiff admits that he was appointed administrator, and that letters of administration issued to him as stated, and admits that Frank E. McMaster deceased, made a written application to defendant for five policies for life insurance of one thousand dollars each, and that defendant executed and delivered said policies to deceased, but expressly denies that said policies or either of them were executed or delivered on the 12th day of December, 1893.

25 Plaintiff expressly denies that said request to date policies on the 12th day of December, 1893, was ever made by deceased, and further alleges that said policies or either of them were not dated or signed until the 19th day of December, 1893, and that the defendant is estopped from claiming that said policies or either of them went into force on the 12th day of December, 1893.

Plaintiff expressly denies that said policies or either of them lapsed and were forfeited for non-payment of premium and plaintiff expressly denies that Frank E. McMaster deceased had notice that said policies would be forfeited if the premium due on said policies was not paid, and denies notice given, if any, was a notice required by the laws of the state of New York, as required by said policies, or as required by the law of Iowa.

Plaintiff further alleges that it was the common practice of defendant to receive premiums after they fell due, and after more than one month had elapsed after the time of payment.

Plaintiff further alleges that by the false and fraudulent insertion in the application of the words "Please date policy same as application" in the manner stated in plaintiff's petition, that the defendant is estopped from claiming that said policies, or either of them, have lapsed, and are estopped from claiming that the premium on said policies, or either of them was due and payable on the 12th day of December of each year.

Plaintiff expressly denies that Frank E. McMaster deceased, ever made the request in said application to "please date policies same as application" and alleges that said request was made without deceased's knowledge or consent, by defendant's authorized agent and after deceased had signed said application, therefore, the defendant is estopped from claiming that the policies, or either of them, have lapsed for non-payment of premiums on the 12th day of December.

Plaintiff further alleges that the defendant is estopped from claiming that said policies are forfeited, for the reason that during the month of December 1893, the defendant, through its agents, by the offer of a bonus from the defendant, given for all insurance placed in force and effect during said month of December, and year of 1893, authorized its agents to place in the application the words, "Please date policy same as application" and that this was customarily done by the agents of the company during the month of December 1893, with the knowledge of said defendant, after the application had been signed.

Wherefore, plaintiff alleges that defendant is estopped by its own wrongful act from claiming any benef' by reason of said request to date policy same as applicatio

Wherefore, plaintiff asks judgment against defendant as prayed in his petition herein.

F. E. GILL,
Attorney for Plaintiff.

Indorsed: No. 217 law. In the Circuit Court of the United States, Northern District of Iowa, Western Division. Fred A. McMaster, administrator of the estate of Frank E. McMaster deceased, vs. New York Life Insurance Co. Reply to amended and substituted answer and amendment to substituted answer. Filed April 25, 1896. A. J. VanDuzee, Clerk. By J. H. Bolton, Deputy.

26 And afterwards, to wit, on the 12th day of December 1896, there was filed in the office of the Clerk of said Court in said cause, an amendment to amended and substituted answer, which is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Iowa, Western Division.

Fred A. McMaster, administrator of the estate of Frank E. McMaster, deceased, Complainant,

vs.

New York Life Insurance Company, Defendant.

Amendment to amended and substituted Answer.

Comes now the defendant, and by leave of court files an amendment to the amendment to its substituted answer, by adding thereto the following:

The defendant further answering says, that the following provision is embodied in the said written application signed by the said Frank E. McMaster, which is attached to said policies of insurance and made a part thereof. Said provision is as follows, to wit:

"I do hereby agree that inasmuch as only the officers at the home office of said company in the city of New York, have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, no statements, representations, promises or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, promises or information be reduced to writing and presented to the officers of said company at the home office in this application."

That by the terms and conditions of said provision as agreed to as aforesaid, the insured thereby agreed that the whole contract of insurance should be expressed in writing in the application and policies to which said application is attached, and that, by virtue of said provision, all promises, agreements and conditions verbally expressed by the agent of said company to said assured, not embodied in writing in the said application, should be disregarded; and that the application as presented to the home office, together with the policies to which it is attached, constitutes, by said agreement, the entire contract between the parties.

PARK & ODELL,
Attorneys for Defendant.

Indorsed: No. 217, Law. U. S. Circuit Court, Nor. Dist. of Iowa, Western Div. Fred A. McMaster, adm., vs. New York Life Ins. Amendment to amended and substituted answer. Filed Dec. 12th, 1896. A. J. VanDuzee, Clerk. By J. H. Bolton, Deputy.

27 And afterwards, to wit, on the 5th day of April, 1897, there was filed in the office of the Clerk of said Court in said cause an amendment to petition, which is in the words and figures following, to wit:

In the Circuit Court of the United States in and for the Northern District of Iowa, Western Division.

Fred A. McMaster, Administrator of the estate of Frank E. McMaster, deceased, Plaintiff.

vs.

The New York Life Insurance Company, Defendant.

AMENDMENT TO PETITION.

To the Honorable Judge of the Circuit Court of the United States in and for the Northern District of Iowa, Western Division:

Comes now the plaintiff herein, and first having obtained leave of the Court, amends his petition in the above entitled action, by alleging after the words "a part hereof" in the ninth line on page two of said Count I in said petition, and before the words, "that on or about the 25th day of December," the following:

That since the commencement of said action by bill in equity and by decree of said Court, the policies sued on herein were so corrected that each of said policies now reads,—"of the payment of a like sum on the 18th day of December, in every year thereafter during the continuance of this policy". That said decree was entered on or about the 6th day of January, 1897, in the Circuit Court of the United States in and for the Northern District of Iowa, Western Division.

Wherefore plaintiff demands judgment against the defendant herein for the sum of $5000, with interest thereon from the 18th day of January, 1895, and the costs of this action as prayed in his petition.

F. E. GILL, Attorney for Plaintiff.

Indorsed: In the Circuit Court of the United States, in and for the Northern District of Iowa, Western Division. Fred A. McMaster, &c., vs. New York Life Ins. Co. Amendment. Service of copy of within amendment accepted this 2nd day of April, 1897. Park & Odell. Swan, Lawrence & Swan. No. 217 Law. Filed April 5th, 1897. A. J. Van Duzee, Clerk. By J. H. Bolton, Deputy.

28 And afterwards, to wit, on the 27th day of September, 1898, there was filed in the office of the Clerk of said Court an amendment to petition, which is in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Iowa, Western Division.

Fred A. McMaster, Administrator,
vs. No. 217 Law.
New York Life Insurance Company.

AMENDMENT TO PETITION.

Comes now the plaintiff, and with leave of Court first had and obtained, amends his petition herein, by adding thereto the following allegations:

That at the time said defendants delivered said policies to said McMaster, said McMaster took them and was about and began to examine them when said defendant there and then expressly stated, through its authorized agent, that said policies, and each of them, did insure said McMaster for thirteen months from the actual payment of the first premium thereon, and that said construction of said policies so made and given by said authorized agent of said defendant was by said agent represented to said McMaster to be, and in fact was, the construction given by said defendant to said agent with authority to so represent to said McMaster, whereupon, said McMaster, relying upon said construction and induced thereby, discontinued his examination and reading of said policies, folded them and placed them away for safe-keeping unread, and there and then, to wit, on December 25, 1893, in reliance upon said construction so made and given by said defendant, paid to said defendant the full amount of the first premium upon each of said policies, which said defendant received, and has ever since retained, and the terms of said policy, although some-

what indefinite and confused in statement, were by said McMaster believed to be as so then construed to him by the defendant, and in reliance thereon, he then paid his said premiums, and the defendant is now bound thereby and cannot now be heard to deny or repudiate the said construction and should be held, barred and estopped from placing any other or different construction thereon to the prejudice of said McMaster, or the plaintiff herein.

F. E. GILL, Attorney for Plaintiff.

No. 217 Law. Circuit Court of the United States for the Northern District of Iowa, Western Division. Fred A. McMaster, Admr., vs. New York Life Ins. Co. Amendment to Petition. Filed Sept. 27, 1898. A. J. Van Duzee, Clerk. By J. H. Bolton, Deputy.

29 And afterwards, to wit, on the 27th day of September, 1898, there was filed in the office of the Clerk of said Court in said cause, an amendment to reply, which amendment is in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Iowa, Western Division.

Fred A. McMaster, Administrator,
vs. No. 217 Law.
New York Life Insurance Company.

AMENDMENT TO REPLY.

Comes now the plaintiff, and by leave of Court first had and obtained, amends his reply herein by adding thereto the following allegations.

That at the time said defendant delivered said policies to said McMaster, said McMaster took them and was about and began to examine them, when said defendant there and then expressly stated, through its authorized agent, that said policies, and each of them, did insure said McMaster for thirteen months from the actual payment of the first premium thereon, and that said construction of said policies so made and given by said authorized agent of said defendant was by said agent represented to said McMaster to be, and in fact was, the construction given by said defendant to said agent with authority to so represent to said McMaster, whereupon said McMaster, relying upon said construction and induced thereby, discontinued his examination and reading of said policies, folded them and placed them away for safe-keeping unread, and there and then, to wit, on December 25th, 1893, in reliance upon said construction so made and given by said defendant, paid to said defendant the full amount of the first premium

upon each of said policies, which said defendant received and has ever since retained, and the terms of said policy, although somewhat indefinite and confused in statement, were by said McMaster believed to be as so then construed to him by the defendant, and in reliance thereon, he then paid his said premiums, and the defendant is now bound thereby and cannot now be heard to deny nor repudiate the said construction and should be held, barred and estopped from placing any other or different construction thereon, to the prejudice of said McMaster, or the plaintiff herein.

F. E. GILL, Attorney for Plaintiff.

Indorsed: No. 217 Law. Circuit Court of the United States for the Northern District of Iowa, Western Division. Fred A. McMaster, Admr., vs. New York Life Ins. Co. Amendment to Reply. Filed Sept. 27, 1898. A. J. Van Duzee, Clerk. By J. H. Bolton, Deputy.

30 And afterwards to wit, on the 5th day of October, 1898, there was filed in the office of the Clerk of said Court in said cause, an answer to Amendments, which is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Iowa, Western Division.

Fred A. McMaster, Administrator of the estate of Frank E. McMaster, deceased,

vs.

New York Life Insurance Company, Defendant.

ANSWER TO AMENDMENTS.

Now comes the defendant, and for answer to the amendments to the petition of the plaintiff filed herein on the 27th day of September, 1898, denies each and every of the allegations therein contained.

SWAN, LAWRENCE & SWAN,
W. E. ODELL, Attorneys for Defendant.

State of Iowa,
Woodury County—ss.

J. S. Lawrence, being duly sworn, on oath says that he is one of the attorneys for the defendant in the above entitled action; that he has read the foregoing answer to amendments, and know the contents thereof, and the statements and allegations there in contained are true as he verily believes.

J. S. LAWRENCE.

Sworn to before me and subscribed in my presence by the said J. S. Lawrence this 17th day of November, 1898.

ARNOLD L. FRIBOURG,
Notary Public in and for Woodbury County, Iowa.

Indorsed: Circuit Court of United States, Northern District of Iowa, Western Division. Fred A. McMaster, Administrator of the estate of Frank E. McMaster, deceased, vs. New York Life Insurance Company. Answer to Amendments. Filed October 5th, 1898. A. J. Van Duzee, Clerk. By J. H. Bolton, Deputy.

And afterwards to wit on the said 5th day of October,
31 1898, there was filed in the office of the Clerk of said Court in said cause a waiver of Jury, which is in the words and figures following to wit:

In the Circuit Court of the United States Northern District of Iowa Western Division.

Fred A. McMaster, Admr.
vs. No. 217 Law. Stipulation.
New York Life Ins. Co.

It is hereby stipulated and agreed that the jury is waived in the trial of the above entitled case.

F. E. GILL and
H. J. TAYLOR, Attys. for Plff.
W. E. ODELL and
SWAN, LAWRENCE & SWAN
Attys. for defendants.

Indorsed: No. 217 Law. In the Circuit Court of the United States Northern District Western Division. Fred A. McMaster Adm'r vs New York Life Ins. Co. Stipulation to waive Jury. Filed Oct. 5, 1898. A. J. Van Duzee, Clerk.

32 And on the 7th day of December A. D. 1898, there was filed in the office of the Clerk of said Court in said cause, a written opinion of the Court, together with the findings of fact in this case, which is in the words and figures following, to wit:

In the United States Circuit Court in and for Northern District of Iowa, Western Division, October Term, 1898

Fred A. McMaster, Administrator
vs. Law.
New York Life Insurance Company.

By written stipulation duly signed and filed, the parties to this action waived a jury trial, and consented to try the case before the Court, and the evidence having been fully submitted the Court finds the facts established by the evidence to be as follows:

1st. The plaintiff Fred A. McMaster [—] when the suit was brought and, is now, the lawfully appointed administrator of the estate of Frank E. McMaster, deceased having been ap-

pointed administrator of the named estate by the Probate Court of Woodbury County, Iowa, and furthermore said plaintiff was, when this suit was brought and is now a citizen of the State of Iowa, and a resident of Woodbury County Iowa.

2nd. That the defendant, the New York Life Insurance Company [—] when this suit was brought and is now, a corporation created under the laws of the state of New York, having its principal office and place of business in the City of New York in the state of New York, but being also engaged in carrying on its business of life insurance in the State of Iowa, and other states.

3rd. That in December 1893, F. W. Smith, an agent for the New York Life Insurance Company residing at Sioux City Iowa, solicited Frank E. McMaster to insure his life in that Company, and as an inducement to taking the insurance, pressed upon McMaster the provision adopted by the company and set forth in the circulars issued by the company, and printed on the back of the policies issued by the company under the heading "Benefits and provisions referred to in this policy" in the following words: "After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent per annum for the number of days during which the premium remains due and unpaid, during said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance."

33 4th. Relying on the benefits of this provision and in the belief that if he accepted a policy of insurance upon his life, from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed, since the last payment of the annual premium, the said Frank E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on and attached to the petition, the same being made part of this finding of facts.

5th. In the application when signed by Frank E. McMaster, it was provided that the amount of insurance applied for was the sum of $5000 to be evidenced by five policies for $1,000 each on the ordinary life table, the premium to be payable annually.

6th. There now appears on the face of the application, interlined in ink, the words, "please date policy same as application." These words were not in the application when it was signed by McMaster, but after the signing thereof, they were

written into the application by F. W. Smith, the agent of the New York Life Insurance Company, without the knowledge or assent of Frank E. McMaster, and were so written in by the agent in order to secure to the agent a bonus which the company allowed to agents for business secured during the month of December, 1893, and it does not appear that Frank E. McMaster ever knew that these words had been written into the application and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company and was acted on by the company.

7th. By the express understanding had between F. W. Smith, the agent of the New York Life Insurance Company and Frank E. McMaster when the application for insurance was signed, it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies and that the contract of insurance was not to take effect until the policies were delivered.

8th. The defendant company, at its home office in New York city, upon receipt of the application determined to grant the insurance applied for and issued five policies each for the sum of $1000 dated December 18th, 1893, and reciting on the face thereof that the annual premium on each policy was $21 and forwarded the same to its agent F. W. Smith, at Sioux City, Iowa, for delivery to Frank E. McMaster. These five policies are in the form of the one attached to the petition in this case, which is hereby made part of this finding of fact, and each policy contains the recital: "This contract is made in consideration of the written application for this policy, and of the agreements, statements, and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and .... cents to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy."

9th. The five policies enclosed in envelopes on or about December 26th, 1893, were taken by F. W. Smith, the agent of the defendant company to the office of Frank E. McMaster who asked the agent if the policies were as represented, and
34 if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him and thereupon McMaster paid the agent the full first annual premium or the sum of twenty-one dollars on each policy and without reading the policies he received them and placed them away.

The agent did not in any way attempt to prevent McMaster from reading the policies and he had the full opportunity for reading them, but in fact did not read them and accepted them on the statement of the agent of the company as hereinabove set forth.

10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the State of New York.

11th. The renewal receipts for the second annual premium on the five policies held by Frank E. McMaster, in the defendant company, were sent for collection to Mary A. Ball, at Sioux City, Iowa, who on the 11th or 12th day of December, 1894, called on said McMaster for payment of the premiums in question. At that time McMaster declined making payment thereon, saying that he had seen other policies which promised better results and that he did not think he would renew the insurance in the defendant company. Miss Ball told him the New York contracts had some nice provisions like thirty days of grace and loans, and in reply to an inquiry from McMaster, stated that his policies entitled him to the month's grace in the payment of the premiums and that, as he understood it, the grace on the second premium would expire January 11th, and McMaster said if he concluded to keep any of the insurance he would call and pay for it, before the grace expired.

12th. That in November or December, 1894, Frank E. McMaster was examined for the purpose of obtaining life insurance by the agents of the Union Central Insurance Company, it being understood between the parties that the policies were not to issue until in January, 1895, and it being the purpose of McMaster to take one or two thousand dollars insurance in the Union Central Company, at the expiration of his insurance in the defendant company, but also to continue part of the policies held in the defendant company.

13th. That on or about January 15th, 1895, the agent of the Union Central Company meeting McMaster on the street in Sioux City told him the policies issued by the Union Central Company had been received and in reply McMaster said, "All right, just hold them, there is no hurry about them," and in the same conversation he stated that he had other insurance, referring to the policies in the defendant company.

14th. That the action of Frank E. McMaster shows and the Court so finds the fact to be, that the said McMaster believed that the policies issued to him by the defendant company would

continue in force for the period of thirteen months from the date of the policies and his action with respect to the policies in the defendant company and the proposed insurance in the Union Central Company was based upon and governed by this belief on his part.

35 15th. That Frank E. McMaster died at Sioux City on the morning of January 18th, 1895.

16th. That up to the time of his death, the said Frank E. McMaster had not paid the second year's premiums on the policies issued to him by the defendant company, nor have the same been paid since his death, nor had the said McMaster received or paid for the policies issued by the Union Central Company, and the same had not been delivered or become effectual.

17th. That due and sufficient notices and proofs of the death of said Frank E. McMaster were immediately sent to and received by the defendant company, and due demand for the payment of the five policies sued on was made by the plaintiff, as administrator of the estate of Frank E. McMaster, and refused by the defendant company, on the ground that the policies in question had lapsed and were not in force at the time of the death of said Frank E. McMaster, by reason of the failure to pay the second year's premium coming due on said policies.

18th. That the defendant company has not paid said policies or any part thereof, and assuming the same to be valid, there is due thereon, November 1, 1898, the sum of ($5965.00) five thousand nine hundred and sixty-five dollars, after deducting from the face of the policies the amount of the second premiums with interest thereon to March 14, 1895.

SHIRAS, District Judge.

A suit in equity was brought in this court by the administrator of the estate of Frank E. McMaster against the defendant Insurance Company praying a reformation of the policies in question, on the ground that the provision inserted therein, making the second annual premiums payable on the 12th day of December, 1894, was not in accordance with the agreement of the parties and upon the hearing of that case this Court held that under the rules of construction applied to contracts of this character, the plaintiff could recover at law thereon, but as the evidence clearly proved that the application signed by McMaster had been changed after he signed it by the interlineation of the words, "Please date policy same date as application," this interlineation being made by the agent of the defendant company without the knowledge or assent of McMaster, which interlineation, made for the benefit of the agent of the defendant company, and against the interest of the applicant McMaster, had

caused the defendant, when issuing the policies to make the second year's premium payable on December 12, 1894, although the policies were dated December 18 and not delivered until December 26th, 1893, the policies ought to be reformed to accord with the actual agreement of the parties. McMaster, administrator, vs. New York Life Ins. Co., 78 Fed. Rep. 33.

Upon appeal to the Circuit Court of Appeals for this circuit the decree of reformation was reversed, that Court holding that the policies in the form in which they were delivered must be held to represent the contract of the parties; the Court further expressing the opinion that no recovery could be had thereon at law or in equity. New York Life Ins. Co. vs. McMaster, 87 Fed. Rep. 63.

36 The case at law is now before the Court, the question being whether a recovery can be had upon the policies in their present form and under the facts now proven by the evidence.

The policies are dated December 18th, 1893. They were delivered and one annual payment of twenty-one dollars was then paid on each policy. This payment and the delivery of the policies put in force contracts for insurance good, not for one year only, but good for the lifetime of McMaster. Thus in Insurance Co. vs. Statham, 93 U. S. 24, it is said: "We agree with the court below, that the contract is not an assurance for a single year, with the privilege of renewal from year to year, by paying the annual premium, but that it is an entire contract for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums."

In Thompson vs. Insurance Co., 104 U. S. 252, it is ruled: "We do not accept the position that the payment of the annual premium is a condition precedent to the continuance of the policy. That is untrue; it is a condition subsequent only, the non-performance of which may incur a forfeiture of the policy, or may not, according to the circumstances.

It is always open for the assured to show a waiver of the condition, or a course of conduct on the part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be exacted."

Forfeitures are not favored, either at law or in equity, and to sustain the right to declare a contract, which has gone into effect, forfeited by reason of a subsequent failure to perform its conditions, it is incumbent on the party pleading the forfeiture to clearly establish the defense, and in the case of contracts, like insurance policies, wherein the assured has no voice in the selection of the terms used, the construction must be

against the party who prepared the contract, and furthermore if there be [ground] in the policy provisions which are inconsistent or contradictory, force must be given to those that sustain, rather than to those which would forfeit the contract.

Thus in National Bank vs. Insurance Co., 95 U. S. 673-678, it is ruled: "But without adopting either of these constructions, we rest the conclusion already indicated upon the broad ground that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of applicant's statements to be a condition precedent to any binding contract, the Court should lean against that construction which imposes upon the assured the obligations of a warranty. The company cannot justly complain of such a rule.

Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud and of securing the just rights of the assured, under a valid contract of insurance. It is its own language which the Court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

In this case on page 675 it is said, "The entire application having been made by express words, a part of the policy, it is entitled to the same consideration as if it had been inserted at large in the instrument. The policy and application to-
37 gether therefore, constitute the written agreement of insurance; and in ascertaining the intention of the parties, full effect must be given to the conditions, clauses and stipulations contained in both instruments."

In the policies sued on in this case, the applications are attached to the policies and are expressly made part thereof and therefore full effect must be given to the stipulations and provisions therein contained.

It is a familiar rule in the construction of contracts that the Court should, so far as possible, place itself in the position the parties occupied when the contract was entered into and to this end, it may follow the successive steps which the evidence proves were taken by the parties themselves when entering into the contract which is before the Court for construction.

The policies sued on recite on their face that they are made in consideration of the provisions of the application and it is well known that the making[—]the application precedes the issuance of the policy, so we turn to it in the first instance to ascertain, from its provisions, what the contract was which the parties proposed to enter into. The application contains the

usual questions as to the age of the party, his previous condition of health and other like matters and then clause 10 required a statement of the sum to be insured, of the premiums payable, whether annually, semi-annually, or quarterly, and on what table the premium is to be calculated, whether on that of ordinary life, endowment or limited endowment. The applicant, in the mode pointed out on the application, stated that he desired insurance in the sum of $5000 in the form of five policies of $1000 each, the premiums to be payable annually, the amount thereof to be calculated on the ordinary life table, it being also stated that the policies issued on these applications should not be in force until the first premiums thereon were paid to the company or its agent. As is well known from the common custom of insurance companies, and as appears from the form of the application prepared by the defendant company, a choice is given to the applicant to determine whether the premiums are to be paid at intervals of a quarter of a year, of half a year, or yearly and the amount of each payment is fixed by the selection made by the applicant. So also a choice is given to the applicant to determine whether the payment of premiums is to be continued during the lifetime of the assured or is to cease at the end of a named period of years, the amount of each premium being affected by the choice made in these particulars. When the insurance company submits to the party to be insured, as was done in this case, a form of application which required the applicant to determine the table according to which the amount of the premium is to be calculated, and also the time when payable, whether quarterly, semi-annually or annually, and the applicant makes his selection in these particulars, and the policy is issued upon the basis of the application certainly both parties must be bound thereby.

Thus in this case when the company submitted the application to the assured for the purpose of having him determine whether the payment of the premiums should be made quarterly, semi-annually or annually, and also upon what table of rates the premiums should be calculated and the assured, in the manner required by the application submitted to him, declared that the premium was to be paid annually, the amount to be calculated on that basis by the ordinary
38 life table, and thereupon the company issued the policy, making this application part of the contract between the parties, what was the result? The agreement of the parties was that the first premium was to be paid in advance, that is, the contract of insurance was not to take effect until the premium was paid. It was also agreed that the premiums were to be paid annually, that is each subsequent premium was to become due and payable after the lapse of one year

from the time the preceding premium became due, and the amount of each yearly payment was to be calculated on the basis of the ordinary life table. Naturally the next question that would arise would be as to the effect of a failure to pay any of the premiums coming due after the policy had become effectual. Unless the contract contains a provision authorizing a forfeiture thereof for non-payment of premiums, a policy of life insurance which has once gone into effect will not be terminated by the failure to pay subsequent premiums.

In such case the only right the insurance company has is to set off against the amount due on the policy the amount of the unpaid premiums with interest thereon from the time each payment came due. Hence it is that the life companies make provision for forfeiture for non-payment of premiums under certain terms and conditions. The evidence in this case shows that this question of the right of forfeiture did in fact arise and it was answered by pressing on the attention of McMaster the provisions found under the head of "Benefits and Provisions referred to in this Policy," in which it is provided that premiums are due and payable at the home office of the company or to agents holding properly signed receipts it being then stated. "If any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void and all payments previously made shall remain the property of the company."

"After this policy shall have been in force three months a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent per annum for the number of days during which the premiums remain due and unpaid. During said month of grace, the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance." When the company in the form of the application submitted to McMaster stated that the policy would not become binding until the first premium was paid, the company declared that the first premium must be paid in advance, that is, at the time the policy would go into effect, but as to the subsequent premiums the company gave McMaster the right to say whether they should be made payable quarterly, semi-annually or annually, and when he made the choice agreeing to pay the same annually that fixed the times at which the subsequent premiums were to come due, and when the company accepted this application and made it not only a part of, but the very basis of the contract of insurance, it seems clear that the company must be bound by its terms. The choice given to McMaster in selecting the mode of pay-

ment of the premiums gave one year as the longest limit. He could select a year, or a less period, that is a quarter or a half year. By electing to pay the premiums annually, McMaster indicated that his purpose was to have a year's interval between the dates when payment could be demanded of him, and by issuing the policy on an application thus worded, by
39 calculating the premiums on the basis of annual payment and stating on the face of the policy, that the amount of the annual premium was $21, on each policy, and by accepting that amount from McMaster, the company clearly agreed on its part, that after the taking effect of the policies, by the payment of the first annual premium, the payment of the subsequent premiums could only be demanded after the lapse of one year from the date when the preceding payment came due.

The company, by calculating the premiums on the basis of annual payments, and by demanding and accepting from McMaster one full year's premium as the payment necessary to be made to put the policies in force, put its own construction on the application and thereby showed that it understood that it was entitled to demand payment of the premiums by yearly installments of $21 each, and as McMaster had in writing on the face of the application, stated that he wished the premiums to be made payable annually, there can be no doubt that both parties understood that the first premium was to be paid in advance in order to give life to the contract and that the subsequent payments were to be made yearly thereafter. The company, at its home office, concluded to accept the risk and thereupon issued five policies, dating them December 18, 1893, and forwarded them to Sioux City, where they were delivered to McMaster on December 26th, he paying the first year's premiums on the delivery of the policies. Granting the contention of the company, that under the usual practice in such matters, the payment, although actually made on the 26th, is deemed to have been made on the day of the date of the policies, that being the time when the company decided to accept the risk, then the situation would be this: on the 18th of December 1893, the company entered into a contract of insurance with McMaster, in which it was agreed that the premiums were to be paid annually, and the company on the 18th day of December, received the first year's premium in full, and delivered the policies. Suppose at the end of three months the company had demanded of McMaster, the payment of a further or second premium, would it not have been open to him to reply, that the agreement was that the payments were to be made annually; that the first payment had been made and the policy was dated December 18th, and therefore the next payment was not due or demandable until the expiration

of a year from that date. Could the company in response thereto be permitted to aver, It is true when negotiations touching this insurance were pending, we required of you to determine the mode in which the premiums were to be calculated and to be made payable. It is true, that in the application submitted to you for that purpose, you stated that the payments were to be made annually and were to be calculated according to the ordinary life table, on the basis of yearly payments. It is true that we issued the policies on the basis of the application signed by you and expressly made it a part of the contract between us. It is true, we calculated the amount of the premiums to be paid on the basis of yearly payments. It is true, that on the face of the policies, we stated that the annual premium was $21 on each policy. It is true that when we delivered the policies to you we demanded and received from you one full year's premium, and thereupon delivered to you the policies they being dated December 18, 1893. It is true that only three months from that date has
40 elapsed, but we are entitled to now demand payment of another premium, because we wrote in on the face of the policies a provision which makes the second premiums payable at the end of three months, and you accepted the policies in this form and therefore unless you now pay this second premium we will declare the policies forfeited, and we will retain for our own benefit, the full year's premiums paid by you, although three months only of that year has elapsed. Would a court either of law or equity, be justified in so construing the contract of the parties, as to permit a forfeiture in case the assured did not pay the second premium at the end of three months?

It is the well-settled rule that in construing a contract all parts and provisions thereof are to be considered. What constitutes the contract of insurance upon which the rights of the parties in this case depend. This question is answered by the Supreme Court in the case, already cited, of The National Bank vs. Insurance Co., 95 U. S., 673, wherein it is declared that "The entire application having been made, by express words, a part of the policy it is entitled to the same consideration as if it had been inserted at large in that instrument. The policy and application together, therefore, constitute the written agreement of insurance; and, in ascertaining the intention of the parties, full effect must be given to the conditions, clauses, and stipulations contained in both instruments."

Taking up, then, for consideration the contract between the parties, we find in one portion of it an express provision that the premiums to be paid are to be paid annually, and that the

amount thereof is to be calculated on that basis according to the ordinary life table. Turning to another portion of the contract we find a provision which requires the second and subsequent premiums to be paid at periods less than one year from the date of the contract and from the time when the first payment was made. Under the first provision the assured cannot be required to pay the second premiums, until after the lapse of one year from the date of the contract. Under the second provision payment of the second premium is demandable in a period of less than one year. These provisions are clearly inconsistent and contradictory. The rules of construction in case contradictory provisions exist in the same contract are well settled.

Where, as is the fact with reference to insurance contracts, one party prepares the form of the contract and requires the other party to accept it as thus prepared the construction thereof must be against the party who prepared the contract. If possible, the contract must be so contrued as to sustain it and not to defeat it.

If the parties, by their own action, have agreed upon a construction of the contract, that may be followed as the guid · to the intent of the parties.

When the company, having issued the policies sued on, took action thereon, it demanded from McMaster a full year's premium and he paid the same and thus both parties clearly showed that as they understood the contract, it was based upon the payment of annual premiums. That this was the understanding of the company, is further evidenced by the fact that the amount of each premium to be paid, as shown upon the face of the policy, is $21 that amount being entered under the words "Annual Premium" which are placed
41 on the side of the first page of the policy, in a position to catch the eye, being so placed doubtless so that any one interested will see at a glance the amount of the premium and the period of payment.

If the contention of the defendant to the effect that under the contract of the parties it could rightfully demand payment of the second premium before the expiration of a year from the date of the policies, is sustained, it follows that the contract will be forfeited, whereas the recognized rule required a construction that will sustain the contract if that be possible. The purpose McMaster had in view in entering into the contract was to secure indemnity in the sum of $5000 to his estate in case of his death and to secure this indemnity, he agreed to pay to the company the yearly sum of $21 on each policy. The purpose of the Insurance Company in entering into the contract was to obtain the benefit of the yearly premiums called for by the con-

tract, and to induce the payment thereof the company agreed to indemnify the estate of McMaster upon his death in the sum of $5000 and to secure the payment of the yearly premiums, it was further provided that under certain conditions the contract might be forfeited for non-payment of an overdue premium.

If the contract of insurance be now held valid, the purpose of McMaster in entering into the same will be [forfeited], as his estate will thus receive the indemnity he paid his money to secure. So also the purpose of the Insurance Company will be fulfilled in that it will be entitled to retain the premiums already paid, and to be paid any other premium that had become due before the death of McMaster.

If, however, the contracts of insurance are held to be invalid, and non-enforceable, then the purpose of McMaster in entering into the same will be wholly defeated and the Insurance Company will be allowed to avoid its promise to pay the amount of the policies on the death of the assured, while it is permitted to retain the sums paid it to secure indemnity. In effect the contention of the defendant company now is that the contract of insurance must be construed in favor; that it should be so construed as to defeat the purpose for which it was made and to declare it forfeited rather than to sustain it and finally in construing its provisions the construction already put thereon by the parties must be disregarded. The pivotal point in the case is, whether the contract of insurance provides on its face that the premiums were to be paid annually. If it does, this means that the second premium cannot be demanded and does not become due and payable until a full year has elapsed after the date of the policy. Taking into consideration the fact that the company required McMaster to designate on the face of the application whether the premiums were to be paid quarterly, semi-annually or annually; that McMaster declared his choice to be for annual payments and so stated on the face of the application; that the company accepted the application as thus made and issued policies which in terms made the application part of the contract; that the form of the policies issued by the company is that used when the premiums are to be paid annually; that the amounts of the several premiums to be paid were by the company calculated on the basis of annual payments and the amount thereof was stated on the side of the policies under the heading, "Annual Premium" that when the company
42 delivered the policies it demanded from McMaster and he paid one year's premium in full, can there be any possible doubt that the parties understood that the contracts of insurance entered into between them provided for annual payment of the premiums. Can there be any doubt that when Mc-

Master received the policies dated December 18th, 1893, and paid one year's premium thereon, he was justified in assuming that if he died within one year from the date of the policies, his estate would receive the indemnity which it was his purpose to secure even though the policies did not contain the provision giving one month's grace on subsequent payments.

Suppose McMaster had died on the 1st day of December, 1894, less than one year from the date of the policies, would it be open to the company to deny liability on the policies on the ground that it had put in the policies a provision that the second premiums were payable on October 1st, 1894? That is exactly the claim now made by the defendant company. If the company after accepting a proposition to insure McMaster on the basis of annual premiums, can make the second premium payable in six days less than a full year, which is its claim in the present case, it could have made the second premiums payable in three or six months, and would thus change the policy from one wherein the premiums were payable annually into one wherein the premiums were payable quarterly or semi-annually. In such case, it would appear that the contract of insurance contains inconsistent and contradictory provisions and in that event the settled rules of construction require that force shall be given to the provisions which will sustain the contract, rather than to those which would work a forfeiture thereof.

I repeat the assumed case, already stated: suppose these policies did not contain the provision with respect to the so-called month of grace in the payment of subsequent premiums, but did contain a provision that if the premiums were not paid on the day they came due, the policies were forfeited. Suppose the contracts of insurance had been entered into in the mode proven in this case and the policies in the present form, except as to the forfeiture clause, had been issued dated December 18, 1893, and had been delivered upon the payment by McMaster, of one full year's premium thereon, and that McMaster had died on the 15th of December, 1894, that is, in less than a year from the date of the policies.

Would it be open to the defendant company to claim a forfeiture of the contracts under such circumstances? Could the company be permitted to say, it is true we required McMaster to designate the kind of policy we were to issue and he selected policies to be based upon annual payment of the premiums, and so stated in the application? It is true we issued policies of the form used for annual payments. It is true we calculated the premiums on the basis of annual payments and stated the amount on the face of the policies. It is true when we delivered the policies we demanded and McMaster paid us one full year's premium in full. It is true McMaster died in less than one year

from the date of the policies but his estate cannot recover the indemnity he had paid for because we put into the policy a provision making the second premium due and payable on the 12th day of December and as McMaster had not paid this second premium, his estate cannot recover, even though it be true that he died in less than a year from the date of the policy. Would a court be justified in holding that a forfeiture of the contract had happened under such circumstances? Would not
43 the answer be that the application which forms part of the contract between the parties expressly provided that the premiums were to be payable annually and the act of the company in so wording another part of the contract as to require the second premium to be paid in a less period simply resulted in putting contradictory provisions in the contract, in which event the construction must be most favorable to the assured, and in favor of sustaining the policy. But it is said that in this supposed case the party assured died during the year for which the premium had been paid and that while a court would not permit a forfeiture during that period, because in fact the premium for that period had been paid, yet a different rule would prevail, if the party died after the year for which the premium was paid had elapsed, but during the so-called month of grace. If policies of life insurance were like fire insurance contracts, where the risk assumed by the company terminates at a date fixed in the contract, there might be some force in the argument, but such is not the case, and the analogy suggested is misleading. In fire insurance contracts the risk is assumed for a fixed period, and the premium demanded and paid only keeps the contract in force for a named and known period.

When that period elapses, the contract is at an end, unless new life is given it by a renewal for another fixed period, and in such cases the payment of a year's premium only entitles the insured to protection against loss for that period. In cases of life insurance under policies such as are sued on in this case, the contract of insurance when once it takes effect by payment of the first year's premium and delivery of the policies does not terminate at the end of the year, but it is a contract for the life of the assured. In other words when the company in this case issued these policies under date of December 18, 1893, received payment of the first premiums thereon and delivered the policies to McMaster the company agreed on its part to pay the amounts called for in the policies to the estate of McMaster, upon his death whenever the event might occur. If the policies contained no provision for the forfeiture thereof, no further payment on the part of McMaster would have been needed to keep the policies in full force. All the company could demand

in such case would be the right to set off against the amount of indemnity it had bound itself to pay, the amount of the premiums remaining unpaid with interest thereon.

The fact being proven that the first premiums on the policies were in fact paid to the company and that the policies were delivered to McMaster, it follows that from the time of the delivery of the policies McMaster had contracts which bound the company to pay to his estate the sum of five thousand dollars on his death.

By their terms the policies of insurance as contracts extend, not from year to year, but from their date, December 18, 1893, until the death of McMaster, whenever that might occur. The payment of the first premium and the delivery of the policies put them into effect for this period and not solely for one year subject to the right of forfeiture secured to the company.

Therefore when McMaster died on the 18th of January, 1895, the company was bound to pay to his estate the amount called for by the policies, unless the same had become forfeited under some provision thereof securing the right of forfeiture to the company. The provisions of the policies, already quoted, in full do not declare that the same shall be forfeited if a " premium comes due and is not then paid, but it is declared that during one month after a premium becomes due, the company will deem the unpaid premium to be an indebtedness due the company running at interest, and that if the assured dies during this month of grace, the amount of the unpaid premium with interest will be deducted from the sum due on the policy. Under this clause of the policy, to entitle the company to declare the contract forfeited, it must appear that a premium has become due and demandable; that a full month has elapsed since the premiums became thus due and that during this month the amount of the premium with interest has not been paid and that the assured is still living. If during the socalled month of grace, the premium is paid with interest or if the party insured dies, the right of forfeiture does not accrue and the policies remain in full force. The socalled month of grace does not begin to run until a premium becomes due and demandable from the person insured and thus we come back to the question when did McMaster become bound to pay the second premium on the policies sued on. If the payments of the second premiums could not be properly demanded of him until the expiration of one year from the date of the policies, then the second payment did not become due until December 18th, 1894, the month of grace would not begin to run until that payment became due and being a calendar month, it would extend to and would include the 18th day of January, 1895, on the morning of which day McMaster died.

Therefore it is that the company claims that the second premium became due and payable on December 12, 1894. If the contract between the parties, when considered in all its clauses and provisions, shows that it was agreed and understood between the parties that the second premium was to become due and payable on December 12th, 1894, then it is clear that when McMaster died the policies had become forfeited and of course no recovery thereon can be had.

If, however, the contract shows that McMaster contracted with the company on the basis of payments to be made annually and the company dealt with him on that basis, but to serve the interests of its own agent, it without consulting McMaster or calling his attention thereto, introduced a provision into the policy which makes the second premiums payable in less than a year and it thus appears that in the same contract there are to be found inconsistent and contradictory statements and provisions then under the settled rules of construction the Court should give force to those provisions which will prevent a forfeiture, which will sustain the contract and will be most favorable to the assured, disregarding those which would lead to the contrary results.

But it is said the company was justified in what it did with respect to making the second premium due and payable in less than a year, by reason of the statement written into the face of the application, asking that the policy be dated the same as the application and that it is not open, in an action of law, to show that these words were not in the application when the same was signed by McMaster, but had been written in the application, after it had been signed by the agent of the company, and therefore these words must be taken to be the act of McMaster upon which the company had a right to rely.

The provisions of section 1750 code of Iowa were in
45 force in 1893 when these contracts of insurance were entered into, and this statute makes the act of a solicitor or other agent acting for the company, the act of the company and not the act of the applicant for insurance. In the case of the Continental Ins. Co. vs. Chamberlain, 132 U. S. 304, this statute was construed by the Supreme Court with respect to a life policy issued by a foreign company in Iowa, it being held that "this statute was in force at the time the application for the policy in suit was taken, and therefore governs the present case. It dispenses with any inquiry as to whether the application or the policy either expressly or by necessary implication made Boak the agent of the assured in taking such application. By force of the statute, he was the agent of the company in soliciting and procuring the application. He could not, by any

act of his, shake off the character of agent for the company. Nor could the company by any provision in the application or policy convert him into an agent of the assured.

If it could, then the object of the statute would be defeated. His act in writing the answer, which is alleged to be untrue, was, under the circumstances, the act of the company."

The case just cited was an action at law based upon a life insurance policy, issued on the life of Richland Stevens. The defendant company pleaded that in the application signed by Stevens, there was a misstatement of a material fact, in that it was therein stated that Stevens had no other insurance on his life, whereas in fact he had, when the application was signed, a large amount of insurance in co-operative companies. On the trial before the jury, the Court permitted the plaintiff to show by oral testimony that the answer to the question about other insurance was written into the application by the agent of the insurance company, after he had been informed by the applicant that he held this co-operative insurance. The Supreme Court affirmed the action of the trial Court, holding that under the statute of Iowa, it was open to the plaintiff to prove by whom the statement in the application had, in fact, been written, and that it appearing from the evidence that the statement was written by the soliciting agent of the company, it must be held in law to be the act of the company, and being its act, and not that of the assured, it could not be relied on to defeat a recovery on the policy, even though it appeared that it was so written into the application before Stevens signed the same. Under the ruling of the Supreme Court in the case just cited, it must be held that it is open to the plaintiff to show that the words, "Please date policy same as application", were written into the application not by McMaster, but by the agent of the company, and that they were so written after the application had been signed by McMaster, and without his knowledge or assent. As the proof is clear that these words were thus written into the application by the agent of the company and without the knowledge of McMaster, it is settled that the placing them in the application was, in law, the act of the company, and not that of McMaster, and the company cannot rely on its own act, done without the knowledge or assent of the assured, as a ground for estopping the assured or his representative from claiming that under the contract of insurance the premiums were to be paid annually.

But, furthermore, the company did not, in fact, comply with the clause thus written into the application.

46 That requested that the policies should bear the same date as the application, which was December 12, 1893. The policies, when issued, were dated December 18th, 1893, and thus the company refused to comply with the request written into the application. Having refused the request as made, upon what theory can it be said that it made the second premium payable on December 12, 1894, at the request of the assured. Neither on the face of the application nor in any other way was such a request made by McMaster or by anyone else. The company, by its own act, not requested or authorized by McMaster, chose to write into the policy the provision making the second premium come due at a time less than one year after the date of the policy, and there exists no ground for the claim that McMaster was bound by this act of the company by way of estoppel or otherwise.

But it is contended on behalf of the defendant that when the policies were delivered to McMaster they contained the provision making the second premium due and payable on December 12, 1894, and by accepting them with this provision, he indicated his consent to this change in the time of payment. If the evidence proved that the company called McMaster's attention to this provision of the policies and that he assented thereto, there would be foundation for the claim made, but the evidence proves that his attention was not called to the provision and that he accepted the policies and made payment therefor without reading the same, in reliance upon the statement of the agent of the company that the policies were [—] exact accordance with the terms previously agreed upon. There is nothing, therefore, in the facts proven, from which it can be inferred that McMaster ever knowingly assented to the provision now found in the policies, whereby the second payment of the premium was made payable at a date less than one year from the date of the policies.

But it is said that even though he did not read the policies, he had the opportunity so to do and, therefore, that it must be held that he agreed to accept and be bound by the contracts in the form in which they were delivered and accepted.

Granted. What do the contracts, properly construed, require with respect to the payment of the second premiums? Turning to that part of the contract set forth in the application there is the statement in plain words, "Premiums payable annually". The policies are dated December 18, 1893, and the first premiums were paid on December 26th, but under the custom of insurance companies it is considered the same as though

paid on the 18th, the date of the policies, certainly under this clause of the contract, the second payments could not become due or be claimed until the lapse of one year from December 18, 1893.

Turning to another clause of the contract we find a provision, making the second premium due and payable in less than one year from the date of the policies. Are these provisions consistent or are they inconsistent and contradictory? If inconsistent and contradictory, then it is the settled law that force shall be given to the provision that maintains the life of the contract, and that protects the assured rather than the company, through whose fault these inconsistent and contradictory provisions have been introduced into the contracts. Admitting, therefore, that McMaster is to be bound by the contracts in the form in which they were delivered, he can only be held bound by the legal construction thereof as a whole, and thus we come back in every instance to the crucial
47 question, do these contracts contain contradictory provisions with respect to the time when the second premium could be rightfully demanded from McMaster. Upon that question depends the result in this case.

But it is further contended that there is some evidence tending to show that McMaster did not intend to make a second payment of premiums on these policies and, therefore, his representative ought not to recover thereon, as McMaster died after the year for which he had paid the premiums had expired.

If policies of life insurance were like fire insurance policies, in that they terminate at a fixed date, there might be some force in this argument, but as already stated, and is expressly ruled in Insurance C. vs. Statham, 93 U. S., 24, and Thompson vs. Insurance Co., 104 U. S., 252, cases already cited, contracts of life insurance such as those sued on are good for the lifetime of the assured. Therefore, when McMaster died these policies were in force, unless they had become forfeited under the provisions of the policy. There is nothing in the evidence which tends to show that McMaster intended to waive any benefit or protection these contracts would give him, or to yield up any right which his estate might lawfully assert thereunder in the event of his death.

There is some evidence tending to show that McMaster contemplated taking a policy in another company in lieu of part of his insurance in the defendant company, but this purpose had not progressed so far that he had released the defendant company from its liability on the policies sued on, nor can it be known if McMaster had lived, whether in fact he would have finally forfeited any part of this insurance or not. Dur-

ing his lifetime he had done no act which released the company from its obligations, and therefore the company is bound to the payment of the sums called for by these policies, unless it be held that the same, when McMaster died, had become forfeited for non-payment of the second premium due on the policies, and which forfeiture could not be claimed unless it be true that a full calendar month had elapsed between the date when these premiums could be lawfully demanded and the date of McMaster's death. To sustain the plea of forfeiture, it must be held that the parties had contracted and agreed that the second premium should come due in a period less than one year from the date of the policies. If there is doubt on this question, if the contracts between the parties contain contradictory provisions on this point, then the Court is required to look at and give due weight to the acts of the parties with reference to the contracts, and to apply the rule that forfeitures are not favored, and that the construction must be against the party who prepared the contract. Can there be any doubt, under the evidence in this case, that the parties understood and agreed that the insurance furnished to McMaster was to be based upon the payment of premiums annually? Can there be any doubt that the company calculated the amount of the premiums on the basis of annual payments? Can there be any doubt that McMaster paid the sums demanded of him and received the policies upon the understanding that the subsequent premiums were to come due annually and not at some shorter period? In short, can there be any doubt that both parties dealt with each other upon the express agreement that the first premium was to be paid down when the policies were delivered, and the second premium was to
48 come due in one year? Can there be any doubt that upon the face of the application, which is an essential part of the contract between the parties, it is written that the premiums are to be payable annually? The policies are dated December 18th, 1893, and did not take effect actually or constructively, before that date. The premiums, being payable annually, are to be paid then, the first as of the date of policies, and the subsequent premiums annually thereafter. But the company now claims that by its own act, it placed in the contracts a clause which enables it to demand the payment of the second premiums in less than one year from the date of the policies. Thus, the company, by its own act, and without the actual knowledge or assent of McMaster, has made these contracts of insurance self-contradictory; and, this being so, then the construction ought to be against the company, against the forfeiture and in favor of that construction which carries out the real agreement and understanding which the evidence demonstrates existed between the parties to these contracts.

If free to give judgment according to my own view of the questions involved, I should find for the plaintiff, but, as already stated, the Circuit Court of Appeals held in the equity case that there could be no recovery on the policies at law or in equity, and I deem it my duty to follow this ruling, leaving it to the plaintiff to carry this action at law before the Court for its further consideration and, therefore, while my opinion is with the plaintiff, the judgment must be for the defendant.

Indorsed: No. 217 Law. Filed November 7, 1898. A. J. Van Duzee, Clerk.

49 And on the 7th day of November, 1898, the following proceedings were had by said Court in said cause, and entered of record on page 470 of Record No. 2 of said Court, to wit:

Fred A. McMaster, Administrator, etc.,
No. 217. vs. Law.
New York Life Insurance Company.

The above entitled cause having been heretofore, to wit, October 5th, A. D. 1898, at the regular October term of this Court, duly tried and argued and submitted to the Court, the parties hereto having duly signed and filed written stipulation waiving a jury and consenting to try the cause to the Court and the Court being now on this 7th day of November, A. D. 1898, fully advised in the premises, finds and so orders that the motions to strike be overruled, the Court also finds the facts established by the evidence to be as follows, to wit:

1st. The plaintiff, Fred A. McMaster,[—] when the suit was brought and is now, the lawfully appointed administrator of the estate of Frank E. McMaster, deceased, having been appointed administrator of the named estate by the Probate Court of Woodbury County, Iowa; and furthemore said plaintiff was, when this suit was brought and is now a citizen of the State of Iowa and a resident of Woodbury County, Iowa.

2nd. That the defendant, the New York Life Insurance Company, [—] when this suit was brought and is now, a corporation created under the laws of the State of New York, having its principal place of business and office in the City of New York, in the State of New York, but being also engaged in carrying on its business of life insurance in the State of Iowa, and other states.

3rd. That in December 1893, F. W. Smith, an agent for the New York Life Insurance Company residing at Sioux City, Iowa, solicited Frank E. McMaster to insure his life in that company, and as an inducement to taking the insurance, pressed upon McMaster the provision adopted by the company

and set forth in circulars issued by the company, and printed on the back of the policies issued by the company under the heading, "Benefits and Provisions referred to in this Policy" in the following words, "After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent per annum for the number of days during which the premium remains due and unpaid. During said month of grace the unpaid premiums with interest as above, remains an indebtedness due the company, and in the event of the death during the said month, this indebtedness will be deducted from the amount of the insurance."

50 4th. Relying on the benefits of this provision and in the belief that if he accepted a policy of insurance upon his life, from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed, since the last payment of the annual premium, the said Frank E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on and attached to the petition, the same being made part of this finding of facts.

5th. In the application when signed by Frank E. McMaster, it was provided that the amount of insurance applied for was the sum of $5000 to be evidenced by five policies for $1,000 each on the ordinary life table, the premium to be payable annually.

6th. There now appears on the face of the application, interlined in ink, the words, "Please date policy same as application." These words were not in the application when it was signed by McMaster, but after the signing thereof, they were written into the application by F. W. Smith, the agent of the New York Life Insurance Company, without the knowledge or assent of Frank E. McMaster, and were so written in by the agent in order to secure to the agent a bonus which the company allowed to agents for business secured during the month of December, 1893, and it does not appear that Frank E. McMaster ever knew that these words had been written into the application and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company and was acted on by the company.

7th. By the express understanding had between F. W. Smith, the agent of the New York Life Insurance Company and Frank E. McMaster, when the application for insurance was signed, it was agreed that the first year's premium was to be

paid by McMaster upon the delivery to him of the policies and that the contract of insurance was not to take effect until the policies were delivered.

8th. The defendant company, at its home office in New York City, upon receipt of the application determined to grant the insurance applied for and issued five polices each for the sum of $1000 dated December 18th, 1893, and reciting on the face thereof that the annual premium on each policy was $21 and forwarded the same to its agent F. W. Smith, at Sioux City, Iowa, for delivery to Frank E. McMaster. These five policies are in the form of the one attached to the petition in this case, which is hereby made part of this finding of fact, and each policy contains the recital, "This contract is made in consideration of the written application for this policy, and of the agreements, statements, and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and .. cents to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy."

9th. The five policies enclosed in envelopes on or about December 26th, 1893, were taken by F. W. Smith, the agent of the defendant company to the office of Frank E. McMaster who asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him and thereupon McMaster paid the agent the full first annual premium or the sum of twenty-one dollars on each policy and without reading the policies he received them and placed them away.

51

The agent did not in any way attempt to prevent McMaster from reading the policies and he had the full opportunity for reading them, but in fact did not read them and accepted them on the statement of the agent of the company as hereinabove set forth.

10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the State of New York.

11th. The renewal receipts for the second annual premium on the five policies held by Frank E. McMaster, in the defendant company, were sent for collection to Mary A. Ball, at Sioux City, Iowa, who on the 11th or 12th day of December, 1894, called on said McMaster for payment of the premiums in question. At that time McMaster declined making payment

thereon, saying that he had seen other policies which promised better results and that he did not think he would renew the insurance in the defendant company. Miss Ball told him the New York contracts had some nice provisions like thirty days of grace and loans, and in reply to an inquiry from McMaster, stated that his policies entitled him to the month's grace in the payment of the premiums and that, as she understood it, the grace on the second premiums would expire January 11th, and McMaster said if he concluded to keep any of the insurance he would call and pay for it, before the grace expired.

12th. That in November or December, 1894 Frank E. McMaster was examined for the purpose of obtaining life insurance by the agents of the Union Central Insurance Company; it being understood between the parties that the policies were not to issue until in January, 1895, and it being the purpose of McMaster to take one or two thousand dollars insurance in the Union Central Company, at the expiration of his insurance in the defendant company, but also to continue part of the policies held in the defendant company.

13th. That on or about January 15th, 1895, the agent of the Union Central Company meeting McMaster on the street in Sioux City, told him the policies issued by the Union Central Company had been received and in reply McMaster said, "All rght, just hold them, there is no hurry about them," and in the same conversation he stated that he had other insurance, referring to the policies in the defendant company.

14th. That the action of Frank E. McMaster shows and the Court so finds the fact to be, that the said McMaster believed that the policies issued to him by the defendant company would continue in force for the period of thirteen months from the date of the policies and his action with respect to the policies in the defendant company and the proposed insurance in the Union Central Company was based upon and governed by this belief on his part.

52 15th. That Frank E. McMaster died at Sioux City on the morning of January 18th, 1895.

16th. That up to the time of his death, the said Frank E. McMaster had not paid the second year's premiums on the policies issued to him by the defendant company, nor have the same been paid since his death, nor had the said McMaster received or paid for the policies issued by the Union Central Company, and the same had not been delivered or become effectual.

17th. That due and sufficient notices and proofs of the death of said Frank E. McMaster were immediately sent to and received by the defendant company, and due demand for the payment of the five policies sued on was made by the plaintiff,

as administrator of the estate of Frank E. McMaster, and refused by the defendant company, on the ground that the policies in question had lapsed and were not in force at the time of the death of said Frank E. McMaster, by reason of the failure to pay the second year's premium coming due on said policies.

18th. That the defendant company has not paid said policies or any part thereof, and assuming the same to be valid, there is due thereon, November 1, 1898, the sum of ($5965.00) five thousand nine hundred and sixty-five dollars, after deducting from the face of the policies the amount of the second premiums with interest thereon to March 14, 1895.

Accordingly, upon the above finding of facts, now on this 7th day of November, A. D. 1898, judgment is hereby rendered in favor of defendant, and that defendant have and recover of and from the plaintiff the costs of this suit taxed at $.....

to all of which plaintiff at the time duly excepted.

53 And afterwards to wit, on the 14th day of December, 1898, there was filed in the office of the clerk of said court in said cause a bill of exceptions, which is in the words and figures following, to wit:

In the Circuit Court of the United States, in and for the Northern District of Iowa, Western Division. October Term, 1898.

Fred A. McMaster, Administrator, Plaintiff,
vs. Law.
New York Life Insurance Company, Defendant.

BILL OF EXCEPTIONS.

Be it remembered, that by written stipulation duly signed and filed herein, the parties to this action waived a jury trial and consented to try the case before the Court, and the evidence having been fully submitted the Court on the 7th day of November, 1898, duly signed and filed herein findings of fact established by the evidence to be as follows:

1st. The plaintiff, Fred A. McMaster, was when the suit was brought and is now, the lawfully appointed administrator of the estate of Frank E. McMaster, deceased, having been appointed administrator of the named estate by the probate court of Woodbury county, Iowa, and furthermore said plaintiff was, when this suit was brought, and is now a citizen of the State of Iowa and a resident of Woodbury county, Iowa.

2nd. That the defendant, The New York Life Insurance Company was when this suit was brought and is now, a corporation created under the laws of the State of New York, hav-

ing its principal office and place of business in the city of New York, in the State of New York, but being also engaged in carrying on its business of life insurance in the State of Iowa, and other states.

3rd. That in December, 1893, F. W. Smith, an agent for the New York Life Insurance Company residing at Sioux City, Iowa, solicited Frank E. McMaster, to insure his life in that company and as an inducement to taking the insurance pressed upon McMaster, the provision adopted by the company and set forth in the circular issued by the company and printed on the back of the policy issued by the company under the heading, "Benefits and Provisions referred to in this Policy" in the following words: "After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5% per annum for the number of days during which the premiums remain due and unpaid. During said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of the death during the said month this indebtedness will be deducted from the amount of the insurance."

4th. Relying on the benefits of this provision and in the belief that if he accepted a policy of insurance upon his life, from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed since the last payment of the annual [annual] premium, the said Frank
54 E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on and attached to the petition the same being made part of this finding of facts.

5th. In the application when signed by Frank E. McMaster, it was provided that the amount of insurance applied for was the sum of $5000 to be evidenced by five policies for $1000 each, on the ordinary life table, the premium to be payable annually.

6th. There now appears on the face of the application interlined in ink the words, "please date policy same as application." These words were not in the application when it was signed by McMaster, but after the signing thereof, they were written into the application by F. W. Smith, the agent of the New York Life Insurance Company, without the knowledge or assent of Frank E. McMaster and were so written in by the agent in order to secure to the agent a bonus which the company allowed the agents for business secured during the month of December, 1893, and it does not appear that Frank E. McMaster

ever knew that those words had been written into the application and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company and was acted on by the company.

7th. By the express understanding had between F. W. Smith the agent of the New York Life Insurance Company, and Frank E. McMaster when the application for insurance was signed, it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies and that the contract of insurance was not to take effect until the policies were delivered.

8th. The defendant company, at its home office in New York City, upon receipt of the application determined to grant the insurance applied for and issue five policies each for the sum of $1000 dated December 18th, 1893, and reciting on the face thereof, that the annual premium on each policy was $21.00 and forwarded the same to its agent F. W. Smith, at Sioux City, Iowa, for delivery to Frank E. McMaster. These five policies are in the form of the one attached to the petition in this case which is hereby made a part of this finding of fact, and each policy contains the recital: "This contract is made in consideration of the written application for this policy, and of the agreements, statements and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and ..... cents, to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy."

9th. The five policies enclosed in envelopes on or about December 26th, 1893, were taken by F. W. Smith, the agent of the defendant company, to the office of Frank E. McMaster, who asked the agent if the policies were as represented and if they would insure him for the period of thirteen months, to which the agent replied, that they did so insure him and thereupon McMaster paid the agent the full first annual premium or the sum of twenty-one dollars on each policy and without reading the policies he received them and placed them away. The agent did not in any way attempt to prevent McMaster from reading the policies and he had the full opportunity for reading them, but in fact did not read them, and accepted them on the statement of the agent of the company as hereinabove set
55 forth.,

10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster, of the coming due of the premiums on the policies issued to him by the defendant company in accordance with the requirements of the statutes of the State of New York.

11th. The renewal receipts for the second annual premium on the five policies held by Frank E. McMaster in the defendant company, were sent for collection to Mary A. Ball, at Sioux City, Iowa, who on the 11th or 12th day of December, 1894, called on said McMaster, for payment of the premiums in question. At that time McMaster declined making payment thereon, saying that he had seen other policies which promised better results and that he did not think he would renew the insurance in the defendant company. Miss Ball told him the New York contracts had some nice provisions, like thirty days of grace and loans, and in reply to an inquiry from McMaster, stated that his policies entitled him to the month's grace in the payment of the premiums, and that, as she understood it, the grace on the second premiums would expire January 11th and McMaster said, if he concluded to keep any of the insurance he would call and pay for it before the grace expired.

12th. That in November or December, 1894, Frank E. McMaster was examined for the purpose of obtaining life insurance by the agents of the Union Central Insurance Company, it being understood between the parties that the policies were not to issue until in January, 1895, and it being the purpose of McMaster to take one or two thousand dollars insurance in the Union Central Company, at the expiration of his insurance in the defendant company, but also to continue part of the policies held in the defendant company.

13th. That on or about January 15th, 1895, the agent of the Union Central Company, meeting McMaster on the street in Sioux City, told him the policies issued by the Union Central Company had been received and in reply McMaster said: "All right, just hold them, there is no hurry about them," and in the same conversation he stated that he had other insurance referring to the policies in the defendant company.

14th. That the action of Frank E. McMaster shows and the Court so finds the fact to be, that the said McMaster believed that the policies issued to him by the defendant company would continue in force for the period of thirteen months from the date of the policies and his action with respect to the policies in the defendant company and the proposed insurance in the Union Central Company was based upon and governed by this belief on his part.

15th. That Frank E. McMaster died at Sioux City on the morning of January 18th, 1895.

16th. That up to the time of his death, the said Frank E. McMaster had not paid the second year's premiums on the policies issued to him by the defendant company, nor have the same

been paid since his death, nor had the said McMaster received or paid for the policies issued by the Union Central Company and the same had not been delivered or become effectual.

17th. That due and sufficient notice and proofs of the death of said Frank E. McMaster were immediately sent to and received by the defendant company, and due demand for the payment of the five policies sued on was made by the plaintiff, as administrator of the estate of Frank E. McMaster, and refused by the defendant company on the ground that the poli-
56 cies in question had lapsed and were not in force at the time of the death of said Frank E. McMaster, by reason of the failure to pay the second year's premiums coming due on said policies.

18th. That the defendant company has not paid said policies or any part thereof, and assuming the same to be valid, there is due thereon November 1, 1898, the sum of ($5,965) five thousand nine hundred and sixty-five dollars, after deducting from the face of the policies the amount of the second premiums with interest thereon to March 14, 1895.

And accordingly upon said findings of fact, as a proposition of law, the plaintiff Fred A. McMaster, administrator, then and there claimed that upon said findings of fact the law required judgment in favor of said plaintiff and against said defendant for the amount due upon said policies, which claim was by said Court denied, to which denial said plaintiff then and there duly objected and excepted, whereupon said Court then and there based solely and wholly upon said findings of fact, entered judgment in favor of said defendant and against said plaintiff, to which said plaintiff there and then duly excepted and objected claiming that upon said facts so by the Court found, the judgment should be entered in favor of the plaintiff and against the defendant for the amount due upon said policies in petition described, and now herewith said plaintiff presents his bill of exceptions, and asks that the said findings of fact be made a part of the record herein, together with all the pleadings and stipulations of the parties hereto filed herein, and the decree of the Court herein, all of which is now at and during the same term of court at which said judgment was rendered, and in open court, duly done accordingly, and this bill of exceptions being found correct is hereby signed, sealed and made a part of the record in this cause this 14th day of December, 1898.

O. P. SHIRAS, Judge.

Indorsed: No. 217, law. In Circuit Court of United States for Northern District of Iowa, Western Division, October term, 1898. Fred A. McMaster, administrator, plaintiff, vs. New

York Life Insurance Company, defendant. Bill of exceptions. Filed December 14th, 1898. A. J. Van Duzee, Clerk. By J. H. Bolton, Deputy.

57 And afterwards, to wit, on the 17th day of December, 1898, at 9 o'clock A. M. of said day, there was filed in the office of the Clerk of said Court, in said cause, the following papers viz: Assignment of Errors, Petition for Writ of Error, Bond on Writ of Error, and Writ of Error, which are in the words and figures as follows, to wit:

In the Circuit Court of the United States in and for the Northern District of Iowa, Western Division. October Term 1898.

Fred A. McMaster, Administrator, Plaintiff,
vs.
New York Life Insurance Company, Defendant.

ASSIGNMENT OF ERRORS.

Comes now Fred A. McMaster, administrator, plaintiff herein, and says that the judgment in said cause is erroneous and against the just rights of this plaintiff, and that there is manifest error therein for the following reasons.

1. Because the Court erred in denying plaintiff's claim for judgment upon the findings of fact.
2. Because the Court erred in rendering judgment for the defendant upon the findings of fact.
3. Because the Court erred in not holding as a proposition of law, that under said findings of fact said plaintiff was entitled to judgment for the amount due upon said policies of insurance.
4. Because the Court erred in not entering upon said findings of fact a judgment in favor of the plaintiff and against the defendant.

Wherefore, this appellant prays that the said judgment be reversed, and a judgment be entered herein, or that said Court be ordered to enter a judgment in favor of the plaintiff and against the defendant, the New York Life Insurance Company, in the sum of $5965, with interest thereon according to law, from November 1, 1898.

HENRY J. TAYLOR,
F. E. GILL,
Attorneys for Plaintiff.

Indorsed: In Circuit Court of United States for Northern District of Iowa, Western Division. October Term, 1898. Fred A. McMaster, Administrator, Plaintiff, vs. New York Life Insurance Company, Defendant. Assignment of Errors. Filed December 17, 1898, at 9 o'clock, A. M. A. J. Van Duzee, Clerk.

58 In the Circuit Court of the United States in and for the Northern District of Iowa, Western Division. October Term, 1898.

Fred A. McMaster, Administrator, Plaintiff,
vs.
New York Life Insurance Company, Defendant.

PETITION FOR WRIT OF ERROR.

To the Honorable, the Circuit Court of the United States for the Northern District of Iowa, Western Division:

Your petitioner, Fred A. McMaster, administrator, would respectfully represent and show that in the above entitled cause pending in the United States Circuit Court in and for the Northern District of Iowa, Western Division, there was entered at the present October Term, 1898, under date November 7, 1898, in said Court, a final judgment, greatly to the injury of your petitioner, and which said judgment is erroneous and inequitable in many respects, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this writ of error may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit, dated this 15th day of December, 1898.

HENRY J. TAYLOR,
F. E. GILL,
Attorneys for Petitioner.

The foregoing claim of writ of error is allowed in open Court, and at the same term at which said judgment was rendered, now on this 17th day of December, 1898. Appeal bond fixed at $300. O. P. SHIRAS, District Judge.

Indorsed: In the Circuit Court of United States for Northern District of Iowa, Western Division. October Term, 1898. Fred A. McMaster, Administrator, Plaintiff, vs. New York Life Insurance Company, Defendant. Petition for Writ of Error. Filed December 17th, 1898, at 9 o'clock. A. J. Van Duzee, Clerk.

59 In the Circuit Court of the United States in and for the Northern District of Iowa, Western Division. October Term, 1898.

Fred A. McMaster, Administrator, Plaintiff,
vs.
New York Life Insurance Company.

BOND ON WRIT OF ERROR.

Know all men by these presents, that we, Fred A. McMaster, Administrator, as principal, and F. E. Gill and H. J. Taylor, as sureties, are held and firmly bound unto the New York Life Insurance Company, in the full and just sum of three hundred dollars ($300.00), to be paid to said New York Life Insurance Company, to which payment well and truly to be made, we bind ourselves, our heirs, executors, jointly and severally by these presents. Sealed with our seals, and dated this 15th day of December, in the year of our Lord eighteen hundred and ninety-eight.

Whereas, lately at the present October Term, 1898, of the Circuit Court of the United States for the Northern District of Iowa, Western Division, in a suit depending in said Court between said Fred A. McMaster, administrator, plaintiff, and said New York Life Insurance Company, defendant, judgment was rendered for the said defendant, and the said plaintiff has obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation.

Now the condition of the above obligation is such, that if the said Fred A. McMaster, administrator, shall prosecute the said writ of error to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

FRED A. McMASTER, Admr. [Seal]
F. E. GILL. [Seal]
H. J. TAYLOR. [Seal]

Sealed and delivered in the presence of

State of Iowa,
Woodbury County—ss.

F. E. Gill and H. J. Taylor, sureties on the within and foregoing bond, being duly sworn, each for himself, severally, deposes and says that he is worth, after paying his just debts,

more than three hundred dollars, exclusive of property exempt from execution of the laws of the state in which he resides.

F. E. GILL, H. J. TAYLOR.

Subscribed and sworn to before me by the above named F. E. Gill and H. J. Taylor, this 15th day of December, 1898.

60

[Seal] ZENIA M. REEVE,

Notary Public within and for Woodbury County, State of Iowa.

The above bond is approved this 17th day of December, 1898.

O. P. SHIRAS, District Judge.

Indorsed: In Circuit Court of United States for Northern District of Iowa, Western Division, October Term, 1898. Fred A. McMaster, Administrator, Plaintiff, vs. New York Life Insurance Company, Defendant. Bond on Writ of Error. Filed December 17, 1898, at 9 o'clock a. m. A. J. Van Duzee, Clerk.

61 And on the said 17th day of December, 1898, there was filed in the office of the Clerk of said Court in said cause, "Instructions to Clerk as to what shall compose the transcript on writ of error to C. C. of Appeals" which is in the words and figures following, to wit:

In the Circuit Court of the United States in and for the Northern District of Iowa, Western Division, October Term, 1898.

Fred A. McMaster, Administrator, Plaintiff,

vs.

New York Life Insurance Company, Defendant.

The Clerk is hereby directed to put in the transcript for writ of error to the United States Circuit Court of Appeals, for the Eighth Circuit, the following:

1. Entire transcript from State Court filed herein, October 4, 1895.
2. Amended and substituted answer filed October 4, 1895.
3. Reply filed October 5, 1895.
4. Amendment to substituted answer, filed April 24, 1896.
5. Reply to amended and substituted answer and amendment to substituted answer filed April 25, 1896.
6. Amendment to amended and substituted answer filed December 12, 1896.
7. Amendment to petition filed April 5, 1897.
8. Amendment to petition filed September 27, 1898.
9. Amendment to reply filed September 27, 1898.
10. Answer to amendment filed October 5, 1898.

11. Waiver of jury, filed October 5, 1898.
12. Findings of fact signed and filed herein November 7, 1898, which includes the opinion of the Circuit Court.
13. Judgment.
14. Bill of Exceptions.
15. Assignment of Errors.
16. Petition for Writ of Error.
17. Bond on Writ of Error.
18. Citation.
19. Writ of Error.

F. E. GILL,
HENRY J. TAYLOR,
Attorneys for Plaintiff.

Indorsed: In the Circuit Court of United States for Northern District of Iowa, Western Division. Fred A. McMaster, administrator, plaintiff, vs. New York Life Insurance Company, defendant. Instructions to Clerk as to what shall compose the transcript on writ of error to C. C. of Appeals. Filed Dec. 17, 1898. A. J. Van Duzee.

62 In the Circuit Court of the United States, in and for the Northern District of Iowa, Western Division, October Term, 1898.

Fred A. McMaster, Administrator, Plaintiff,
vs.
New York Life Insurance Company, Defendant.

WRIT OF ERROR.

United States of America—ss.

The President of the United States to the Honorable the Judge of the Circuit Court of the United States, for the Northern District of Iowa, Western Division—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, at the October Term, 1898, thereof, between Fred A. McMaster, administrator, plaintiff, and the New York Life Insurance Company, defendant, a manifest error hath happened, to the great damages of the said Fred A. McMaster, administrator, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth

Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United
63 States Circuit Court of Appeals, for the Eighth Circuit, on or before sixty days from the signing and date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of December, in the year of our Lord, one thousand eight hundred and ninety-eight. Issued at office in the City of Sioux City, with the seal of the Circuit Court of [—] United States for the Northern District of Iowa, Western Division, dated as aforesaid.

Circuit Court
U. S.
Northern District
of Iowa.
Sioux City.

A. J. VAN DUZEE,
Clerk of Circuit Court of United States, Northern District of Iowa, Western Division.

Allowed by O. P. SHIRAS, Judge.

64 In Circuit Court of United States, for Northern District of Iowa, Western Division, October Term, 1898. Fred A. McMaster, Administrator, Plaintiff, vs. New York Life Insurance Company, Defendant. Writ of Error. Filed December 17, 1898, 9 o'c. a. m. A. J. Van Duzee, Clerk.

65 United States of America,
Northern District of Iowa—ss.

I, A. J. Van Duzee, Clerk of the Circuit Court of the United States in and for the Northern District of Iowa, do hereby certify and return that the writ of error which is hereto attached was filed in my office at Dubuque on the 17th day of December, A. D. 1898, and a copy thereof at the same time lodged in my office, and I now return said writ of error, and annexed thereto and hereto attached, an authenticated copy of so much of the

record as is covered by the instructions of the parties, in writing hereto attached, in the case mentioned in said writ of error, and the citation and proof of service thereof.

Circuit Court U. S. Northern District of Iowa.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Dubuque in said District the 26th day of December, A. D. 1898.

A. J. VAN DUZEE,
Clerk U. S. Circuit Court, Northern District of Iowa.

[Cancelled 10c U. S. Rev. Stamp.]

66 In the Circuit Court of the United States, in and for the Northern District of Iowa, Western Division, October Term, 1898.

Fred A. McMaster, Administrator, Plaintiff,
vs.
New York Life Insurance Company, Defendant.

CITATION.

The United States of America,
To the New York Life Insurance Company—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States, for the Northern District of Iowa, Western Division, wherein Fred A. McMaster, administrator, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered for the said defendant in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Oliver P. Shiras, judge of the Circuit Court of the United States, for the Northern District of Iowa, Western Division, this 17 day of December, in the year of our Lord, eighteen hundred and ninety-eight.

O. P. SHIRAS, Judge.

67 Personal service of the above citation is hereby admitted on this 23 day of December, 1898.

W. E. ODELL,
SWAN, LAWRENCE & SWAN,
Attorneys for defendant in error.

68 In the Circuit Court of United States, Northern District of Iowa, Western Division. October Term, 1898. Fred A. McMaster, Administrator, Plaintiff, vs. New York Life Insurance Co., Defendant. Citation. Filed December 26, 1898. A. J. Van Duzee, Clerk.

69 United States of America,
Northern District of Iowa—ss.

I, A. J. Van Duzee, Clerk of the Circuit Court of the United States in and for the Northern District of Iowa, do hereby certify that the foregoing is a full, true and perfect transcript of so much of the record and proceedings in the case of "Fred A. McMaster, administrator of estate of Frank E. McMaster, deceased, plaintiff, vs. The New York Life Insurance Company, Defendant," No. 217, Law, as is included in the direction of the parties herewith attached, as fully as the same remain on file and of record in my office.

Circuit Court U. S. Northern District of Iowa.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Dubuque, in said District, this 26th day of December, 1898.

A. J. VAN DUZEE,
Clerk U. S. Circuit Court, Northern District of Iowa.

[Cancelled 10c U. S. Rev. Stamp.]

Filed Jan. 3, 1899. John D. Jordan, Clerk.

69 Appearance for Plaintiff in Error.

And on the third day of January, A. D. 1899, an appearance of counsel for Plaintiff in Error was filed in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

Fred A. McMaster, Administrator, Appellant,
vs.
New York Life Insurance Company, Appellee.
Precipe for Appearance.

The Clerk will enter our appearance as counsel for appellant.
HENRY J. TAYLOR,
FRANK E. GILL.

Indorsed: No. 1202. Fred A. McMaster, Admr., etc., Plaintiff in Error, vs. New York Life Ins. Co. Appearance. Filed Jan. 3, 1899. John D. Jordan, Clerk. Henry J. Taylor, Frank E. Gill, Sioux City, Iowa, Counsel for Plff. in Error.

Appearance for Defendant in Error.

And on the first day of April, A. D. 1899, an appearance of counsel for Defendant in Error was filed in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 1202, December Term, 1898.

Fred A. McMaster, Administrator, etc., Plaintiff in Error,
vs.
New York Life Insurance Company.

The Clerk will enter my appearance as Counsel for the Defendant in Error.

W. E. ODELL.

Indorsed: U. S. Circuit Court of Appeals, Eighth Circuit. December Term, 1898. No. 1202. Fred A. McMaster, Administrator, etc., Plaintiff in Error, vs. New York Life Insurance Company. Appearance. Filed Apr. 1, 1899. John D. Jordan, Clerk. W. E. Odell, Counsel for Deft. in Error.

Order of Submission.

And on the sixteenth day of May, A. D. 1899, in the record of the proceedings of said United States Circuit Court of Appeals is an order of submission in said cause in the words and figures following, to wit:

70 United States Circuit Court of Appeals, Eighth Circuit.
May Term, 1899. Tuesday, May 16, 1899.

Fred A. McMaster, Administrator, etc., Plaintiff in Error,
No. 1202. vs.
New York Life Insurance Company.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

This cause having been called for hearing in its regular order, the motion of defendant in error to dismiss the writ of error was argued by Mr. W. E. Odell in support thereof and submitted to the Court.

On consideration whereof, it is now here ordered that said motion to dismiss be and the same is hereby denied.

Thereupon, this cause came on for hearing upon the merits and was argued by Mr. W. E. Odell for the defendant in error and submitted to the Court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

Opinions.

And on the eleventh day of December, A. D. 1899, the opinions of said United States Circuit Court of Appeals were filed in said cause in the following words, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

No. 1202.—DECEMBER TERM, A. D. 1899.

Fred. A. McMaster, Administrator of the Estate of F. E. McMaster, deceased,
Plaintiff in Error,
vs.
The New York Life Insurance Company,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

Mr. Henry J. Taylor and Mr. F. E. Gill submitted a brief for plaintiff in error.
Mr. W. E. Odell submitted a brief for defendant in error.

Before CALDWELL, SANBORN and THAYER, Circuit Judges.

This was an action brought by the plaintiff in error, Fred. A. McMaster, administrator of the estate of Frank E. McMaster, deceased, against the defendant in error, the New York Life Insurance Company, upon five policies of insurance of one thousand dollars each upon the life of Frank E. McMaster. The defense was that the insurance had ceased before he died on January 18, 1895, because he had failed to pay the annual premiums due on December 12, 1894. The policies were dated on December 18, 1893, and contained these provisions:

"This contract is made in consideration of the written application for this policy, and of the agreements, statements and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and — cents, to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy. * * * If any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided)

this policy shall become void, and all payments previously made shall remain the property of the company. After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5 per cent per annum for the number of days during which the premium remains due and unpaid." The applications for these policies were in writing and were dated on December 12, 1893, and contained this agreement: "I do hereby agree as follows: * * * 2. That inasmuch as only the officers at the home office of said company, in the City of New York, have authority to determine whether or not a policy shall issue on any application and as they act on the written statements and representations referred to, no statements, representations, promises or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, promises or information be reduced to writing and presented to the officers of said company, at the home office in this application." After the applicant had signed the applications the agent who solicited them wrote into each of them, without the knowledge of the applicant, "Please date the policy same as application," and copies of the applications containing this interlineation were attached to the policies which were delivered to the insured on December 26, 1893, when he paid his first annual premiums. He died on January 18, 1895, and the only question in the case was whether or not the second annual premiums which he never paid became due before December 18, 1894. The court below tried the case without a jury, made special findings of the facts and dismissed the action. The findings of facts so far as they are material to the question at issue were as follows:

"3rd. That in December, 1893, F. W. Smith, an agent for the New York Life Insurance Company, residing at Sioux City, Iowa, solicited Frank E. McMaster to insure his life in that company, and as an inducement to taking the insurance, pressed upon McMaster the provision adopted by the company and set forth in the circulars issued by the company, and printed on the back of the policies issued by the company under the heading 'Benefits and provisions referred to in this policy,' in the following words: 'After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent per annum for the number of days during which the premium remains due and unpaid, during said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance.'

"4th. Relying on the benefits of this provision and in the belief that if he accepted a policy of insurance upon his life, from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed, since the last payment of the annual premium, the said Frank E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on and attached to the petition, the same being made part of this finding of facts.

"5th. In the application when signed by Frank E. McMaster, it was provided that the amount of insurance applied for was the sum of $5,000 to be evidenced by five policies for $1,000 each on the ordinary life table, the premium to be payable annually.

"6th. There now appears on the face of the application, interlined in ink, the words 'Please date policy same as application.' These words were not in the application when it was signed by McMaster, but after the signing thereof, they were written into the application by F. W. Smith, the agent of the New York Life Insurance Company, without the knowledge or assent of Frank E. McMaster, and were so written in by the agent in order to secure to the agent a bonus which the company allowed to agents for business secured during the month of December, 1893, and it does not appear that Frank E. McMaster ever knew that these words had been written into the application and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company and was acted on by the company.

"7th. By the express understanding had between F. W. Smith, the agent of the New York Life Insurance Company and Frank E. McMaster when the application for insurance was signed, it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies and that the contract of insurance was not to take effect until the policies were delivered.

"8th. The defendant company, at its home office in New York City, upon receipt of the application determined to grant the insurance applied for and issued five policies each for the sum of $1,000 dated December 18th, 1893, and reciting on the face thereof that the annual premium on each policy was $21 and forwarded the same to its agent, F. W. Smith, at Sioux City, Iowa, for delivery to Frank E. McMaster. These five policies are in the form of the one attached to the petition in this case, which is hereby made part of this finding of fact, and each policy contains the recital: 'This contract is made in consideration of the written application for this policy, and of the agreements, statements and warranties thereof, which are

hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and — cents to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy.'

"9th. The five policies enclosed in envelopes on or about December 26, 1893, were taken by F. W. Smith, the agent of the defendant company to the office of Frank E. McMaster who asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him and thereupon McMaster paid the agent the full first annual premium or the sum of twenty-one dollars on each policy and without reading the policies he received them and placed them away. The agent did not in any way attempt to prevent McMaster from reading the policies and he had the full opportunity for reading them, but in fact did not read them and accepted them on the statement of the agent of the company as hereinabove set forth.

"10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the State of New York.

74

"11th. The renewal receipts for the second annual premium on the five policies held by Frank E. McMaster, in the defendant company, were sent for collection to Mary A. Ball, at Sioux City, Iowa, who on the 11th or 12th day of December, 1894, called on said McMaster for payment of the premiums in question. At that time McMaster declined making payment thereon, saying that he had seen other policies which promised better results and that he did not think he would renew the insurance in the defendant company. Miss Ball told him the New York contracts had some nice provisions like thirty days of grace and loans and in reply to an inquiry from McMaster, stated that his policies entitled him to the month's grace in the payment of the premiums and that, as she understood it, the grace on the second premium would expire January 11th, and McMaster said if he concluded to keep any of the insurance he would call and pay for it before the grace expired.

"12th. That in November or December, 1894, Frank E. McMaster was examined for the purpose of obtaining life insurance by the agents of the Union Central Insurance Company, it being understood between the parties that the policies were not to issue until in January, 1895, and it being the purpose of McMaster to take one or two thousand dollars insurance in the Union Central Company at the expiration of his insurance in the defendant company, but also to continue part of the policies in the defendant company.

"13th. That on or about January 15th, 1895, the agent of the Union Central Company meeting McMaster on the street in Sioux City told him the policies issued by the Union Central Company had been received and in reply McMaster said, 'All right, just hold them, there is no hurry about them,' and in the same conversation he stated that he had other insurance, referring to the policies in the defendant company.

"14th. That the action of Frank E. McMaster shows and the court so finds the fact to be, that the said McMaster believed that the policies issued to him by the defendant company would continue in force for the period of thirteen months from the date of the policies and his action with respect to the policies in the defendant company and the proposed insurance in the Union Central Company was based upon and governed by this belief on his part."

The only error assigned is that upon these facts the judgment should have been for the plaintiff.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

This is another attempt to cause prior and contemporaneous parol statements of the terms and legal effect of written agreements to prevail over the plain stipulations of the writings themselves. The argument of the counsel for the plaintiff in error when reduced to its last analysis is that because in the parol negotiations which preceded the delivery of the policies in suit the agent of the insurance company informed the deceased that his policies would insure his life for thirteen months without the payment of the second annual premiums and because when he delivered the policies to him he told him that they did so insure him, therefore this preliminary information and this contemporaneous statement must supersede the written contracts, which expressly provide that the policies shall cease to be binding if the second premiums are not paid by January 12, 1895, twelve months and seventeen days after the policies were delivered. This proposition as it affects the policies in this case was considered and our decision concerning it was rendered in a suit in equity to reform these policies, which is reported under the title *New York Life Ins. Co.* v. *McMaster*, 57 U. S. App. 638, 30 C. C. A. 532, 87 Fed. Rep. 63, and the Circuit Court of Appeals for the Sixth Circuit has since rendered a like decision upon a similar state of facts in *McConnell* v. *Provident Savings Life Assurance Society*, 92 Fed. Rep. 769. The views expressed in our opinion in the former suit undoubtedly met the approval of the Supreme Court for it denied an application to issue a writ of certiorari to review our decision. 171 U. S. 687.

Our conclusion in the suit in equity was that upon the facts there presented the plaintiff could not recover upon these policies either at law or in equity. The facts which the court below has found in this case do not vary from those presented in the former suit so materially as to warrant a different conclusion here. The only notable difference is that it appears in this case, as it did not in that, that at the time the policies were delivered, the insured "asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him and thereupon McMaster paid the agent the full first annual premium or the sum of twenty-one dollars on each policy and without reading the policies he received them and placed them away. The agent did not in any way attempt to prevent McMaster from reading the policies and he had the full opportunity for reading them, but in fact did not read them and accepted them on the statement of the agent of the company as herein above set forth," and that he believed that the policies would continue in force until thirteen months from their date (which was December 18, 1893) although they plainly stated that the second annual premiums would be due on December 12, 1894; that there was only one month's grace thereafter; that the policies would cease to insure his life if those premiums were not paid within that time, and although on December 11 or December 12, 1894, the collector of the company called on the deceased for these premiums, he declined to pay them and said he did not think he would renew the insurance and she told him that he was entitled to one month's grace and that as she understood it the grace on the second premiums would expire on January 11, 1895. It will be borne in mind that the policies provided that the annual premiums should be paid on December 12, that they gave one month's grace, that they were dated on December 18, 1893, that they were delivered and the first premiums were paid on December 26, 1893, and that the insured died on January 18, 1895, six days after the policies had expired according to their terms. It is also worthy of note that the statement made at the time the policies were delivered was not a representation of any words or terms which the contracts contained, but a mere statement of the legal effect of the policies.

The only question which this new fact that this statement was made when the policies were delivered presents is whether oral statements made by one of the parties to a written contract to the other at the time of its delivery respecting its terms and their legal effect, or the written terms themselves, constitute the agreement, and that question has been repeatedly answered by the Supreme Court and by this court. In *Thompson* v. *Insurance Co.*, 104 U. S. 252, 259, the policy provided that it should be void on the non-payment of the note taken for the premium and the Supreme Court held that a plea that a parol agreement was made, at the time of the giving and accepting of the

policy, that the policy should not become void for the non-payment of the note, but should only be voidable at the election of the company, was bad. Mr. Justice Bradley said: "An insurance company may waive a forfeiture or may agree not to enforce a forfeiture; but a parol agreement, made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument made contemporary therewith, is void, and cannot be set up to contradict the writing. In *Travelers' Ins. Co.* v. *Henderson*, 32 U. S. App. 536, 543, 547, 16 C. C. A. 390, 393, 395, 69 Fed. Rep. 762, 766, 768, the agent of the company told the insured when he delivered the policy that "if anyone killed him while he was going to and from the city the policy would cover him," but the policy expressly excepted "intentional injuries inflicted by the insured or any other person." The insured was shot from ambush and this court held in a suit in equity to reform the policy that the bill must be dismissed and declared the law to be that "where the class of risks intended to be insured against is clearly described in the policy, and the assured has a full and fair opportunity to read the instrument, the company will not be bound by representations made by its agent, in good faith, that the policy covers risks that are not in fact within its provisions." In *Green* v. *Chicago & N. W. Ry. Co.*, 92 Fed. Rep. 873, 877, the plaintiff had signed a final receipt and release of all his claims under a certain contract, before that contract was completed, in reliance upon the statement of the engineer of the railroad company, which was made at the time he signed the release, that it covered nothing but the work already completed. When, however, he sued the company for damages for its refusal to permit him to complete his contract, this court held that the oral statement was incompetent evidence and that the final release had discharged the corporation from all liability. We adhere to the conclusion which we reached upon this question after a review of these and many other authorities in the suit in equity. *New York Life Ins. Co.* v. *McMaster*, 87 Fed. Rep. 63, 69-72, 30 C. C. A. 532, 57 U. S. App, 638. We there said: "This proposition is founded in reason, and sustained by the authorities, and it should be deemed to be the settled law of the land: No representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations as to the terms or legal effect of the resulting written agreement, can be permitted to prevail, either at law or in equity, over the plain provisions and just interpretation of the contract, in the absence of some artifice or fraud which concealed its terms, and prevented the complainant from reading it. *Laclede Mfg. Co.* v. *Hartford Ins. Co.* 19 U. S. App. 510, 513, 520, 9 C. C. A. 1, 3, 8, and 60 Fed. 351, 353, 358; *Insurance Co.* v. *Henderson*, 32 U. S. App. 536, 540, 543, 547, 16 C. C. A. 390, 391, 393, 395, and 69 Fed. 762, 764, 766; *Thompson* v. *Insurance Co.*, 104 U. S. 252, 259; *Insurance*

77

Co. v. *Mowry*, 96 U. S. 544, 547; *Assurance Co.* v. *Norwood*, 57 Kan. 610, 611, 613, 47 Pac. 529, 530, 531, 532; *Association* v. *Kryder*, 5 Ind. App. 430, 435, 31 N. E. 851; *Union Nat. Bank* v. *German Ins. Co.* 18 C. C. A. 203, 71 Fed. 473; *Insurance Co.* v. *Teter*, 136 Ind. 672, 673, 676, 679, 36 N. E. 283; *Burt* v. *Bowles*, 69 Ind. 1; *Clodfelter* v. *Hulett*, 72 Ind. 137; *Hudson Canal Co.* v. *Pennsylvania Coal Co.* 8 Wall. 276, 290; *Insurance Co.* v. *Lyman*, 15 Wall. 664; *Pearson* v. *Carson* 69 Mo. 550; *Insurance Co.* v. *Neiberger*, 74 Mo. 167; *Lewis* v. *Insurance Co.*, 39 Conn. 100."

Nor is it any excuse for a party who has an opportunity to read or to know the contents of his agreement, or any ground for an abrogation or modification of it, that he relied upon the statement or interpretation of it given by the other party to the contract and failed to read it. The very purpose of a written agreement is to supersede testimony of its terms and to shut out the uncertainties that arise from the failing memories and changing interests of living witnesses. Under the law the writing is the highest evidence of the subject, the extent and the manner of the contracting. If written agreements may be swept away and disregarded at will by the parties to them upon simple proof that they did not read them and that the other parties to them told them when they were made that they contained terms different, or had legal effects variant from their actual terms and effects, then the functions of written contracts are gone and the salutary rule that they must prevail over prior and contemporaneous verbal negotiations, arrangements and representations, as to their contents and effects, is subverted. The argument that a false statement of the contents or effect of a contract to one who has possession of it and is about to accept or make it, constitutes a fraud which will avoid the written agreement and estop the party who makes the statement from denying its truth, is conclusively answered by the unanimous opinion of the Supreme Court in *Insurance Co.* v. *Mowry*, 96 U. S. 544, 547. That court said: "The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect, if a party who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment. But the doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention or conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions parties must provide by

stipulations in their agreements when reduced to writing. The doctrine carried to the extent for which the assured contends in this case would subvert the salutary rule, that the written contract must prevail over previous verbal agreements and open the door to all the evils which that rule was intended to prevent. *White* v. *Ashton*, 51 N. Y. 280; Bigelow Estoppel, 437-441; *White* v. *Walker*, 34 Ill. 422; *Faxton* v. *Faxon*, 28 Mich. 159." The statement of the terms or effect of a written agreement which one has in his hands and is about to make and which he may read at his will is not calculated to deceive and is not an artifice or a fraud that will excuse his ignorance of its contents because he has the patent means to verify the averment at his command. It is the written contract itself and not any one's statement of its contents or of its effect which binds the parties and the law charges every party to an agreement with knowledge of this fact. In view of it, it is the duty of every man to see to it that every writing he signs or receives fairly and fully expresses his contract. He owes this duty to the other party to the contract who generally acts, and often changes his position in reliance upon it, and he owes it to the public, which, as a matter of policy, treats the writing as proof of the terms of the agreement. If he fails to discharge this duty, if he fails to read his contract, his ignorance of its contents is the result of his own negligence and in the absence of fraud or mutual mistake he is thereby estopped from showing that its terms are other than those expressed by the writing. *Railway Co.* v. *Bellwith*, 55 U. S. App. 113, 119, 28 C. C. A. 358, 361, 83 Fed. Rep. 437, 440; *Green* v. *Chicago & N. W. Ry. Co.* 92 Fed. Rep., 873, 876. Insurance policies do not constitute exceptions to this rule. *Travelers' Ins. Co.* v. *Henderson*, 32 U. S. App., 536, 540, 16 C. C. A. 390, 393, 395, 69 Fed. Rep. 762, 766, 768; *Morrison* v. *Ins. Co.* 69 Tex. 353, 359; *Quinlan* v. *Ins. Co.* 133 N. Y. 356, 365; *Wilcox* v. *Ins. Co.* 85 Wis. 193; *Fuller* v. *Ins. Co.* 36 Wis. 599, 604; *Hubst* v. *Lowe*, 65 Wis. 316; *Hawkins* v. *Ins. Co.*, 70 Wis. 1, 2; *Herndon* v. *Triple Alliance*, 45 Mo. App., 426, 432; *Palmer* v. *Ins. Co.*, 31 Mo. App., 467, 472; *Ins. Co.* v. *Yates*, 28 Grat. 585, 593; *Ryan* v. *Ins. Co.* 41 Conn., 168, 172; *Barrett* v. *Ins. Co.* 7 Cush. 175, 181; *Holmes* v. *Ins. Co.*, 10 Metc. (Mass.), 211, 216; *Ins. Co.* v. *Swank*, 12 Ins. Law J. 625, 627; *Ins. Co.* v. *Hodgkins*, 66 Me., 109, 112; *Ins. Co.* v. *Neiberger*, 74 Mo. 167, 173; Beach on Insurance (1895) section 414 and cases cited. The statement of the legal effect of the policies made by the agent of the insurance company when they were delivered does not abrogate or modify the terms or the meaning of the contracts.

Nor can his prior statement to the same effect, made fourteen days before, when the applications were signed, or his interlineation in the applications of the request to date the policies the same as the applications after McMaster had signed them and without his knowl-

edge have any greater effect. The reasons for this decision are stated in our opinion in the equity suit. The findings in the case at bar make still clearer the conclusion at which we arrived in that case that prior to the delivery and acceptance of the policies there was no contract and no intention to contract to insure McMaster otherwise than by policies made and delivered upon the simultaneous payment of the premiums, for one of the findings of the court below is that when the application was made "it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies and that the contract of insurance was not to take effect until the policies were delivered."

An ingenious argument for the modification of the policies has been constructed by counsel for the plaintiff in error on the assumption that when the applications were made there was an agreement to insure on the part of the company and a contract to pay the first premiums on the part of the insured. The assumption is unsupported by the facts of the case. The only finding upon the subject is that which we have quoted. But this finding must be read in connection with the application, which was made a part of the findings, and in the light of the custom of life insurance companies to make no contracts to insure except by means of written policies and upon the actual payment of premiums. The application contains this provision: "I do hereby agree as follows: * * * 2. That inasmuch as only the officers at the home office of said company, in the City of New York, have authority to determine whether or not a policy shall issue on any application and as they act on the written statements and representations referred to" &c., from which it clearly appears that the delivery of the policies and the payment of the premiums were conditioned first upon the acceptance of the applications by the officers of the company at the home office and the issue of the policies, and second, upon the acceptance of those policies by the applicant when they were written. Moreover, there is no finding that the insurance company ever agreed to issue any policies or to insure the life of McMaster in any way when the applications were signed or at any time before the policies were delivered. There was therefore no consideration for any agreement by McMaster to pay the premiums and no binding contract on his part to do so or on the part of the company to issue any policies or to insure his life until the policies were actually delivered and the first premiums were paid. Prior to that time the company was free to reject the applications, the insured was free to reject the policies and the whole subject and the entire extent of the agreement found by the court is limited to the time when the premiums should be paid and when the insurance should take effect if the company should subsequently conclude to accept the applications and to issue the policies, and if McMaster should decide to accept them when written. This agree-

ment is in accord with the customary course of the conduct of life insurance. The almost universal custom of that business is for the companies to make no contract and to incur no liability to insure the life of any man until a premium has been paid and a policy has been delivered. *Equitable Life Assurance Society* v. *McElroy*, 49 U. S. App. 548, 561, 28 C. C. A. 365, 372, 83 Fed. Rep. 631, 638; *Paine* v. *Pacific Mutual Life Ins. Co.*, 10 U. S. App. 256, 263, 2 C. C. A. 459, 461, 51 Fed. Rep. 689, 691; *Heiman* v. *Phœnix Life Ins. Co.*, 17 Minn. 153, 157; *Markey* v. *Mutual Benefit Life Ins. Co.*, 103 Mass. 78; *Hoyt* v. *Mutual Benefit Life Ins. Co.*, 98 Mass. 539, 543; *Markey* v. *Mutual Benefit Life Ins. Co.*, 118 Mass. 178, 194; 1 May on Insurance (3rd Ed.) §56.

There was therefore no contract of insurance until the policies were delivered to and accepted by McMaster. The applications were nothing but a proposition to take insurance. They were not contracts, but mere requests for, or a proposition to take policies. The company was not bound to grant these requests or to accept the proposition. It had the right to reject them *in toto* or to reject some parts of them and to make a counter-proposition. It took the latter course. It rejected some parts of the applicant's proposition and made a counter-proposition. It proposed by the five policies it sent to the deceased to insure him on the terms written therein. But these policies were nothing but a proposition to insure up to the time when McMaster accepted them and paid the first annual premiums. The proposition which these policies contained was clearly expressed and its meaning was plain. The law, as we have seen, charged McMaster with knowledge of their terms, and when he accepted them estopped him from disputing these terms on the ground that he had not read them, because the policies were placed in his hands and his failure to read them was his own negligence. On December 26, 1893, he accepted the policies and paid the first annual premiums. Then for the first time contracts to insure his life were made and they were that the company would insure it as long as he paid his annual premiums within one month of December 12 in each year. This brief review of the course and effect of the negotiations which preceded the acceptance of the policies shows how baseless is the claim that the statement of the agent when the policies were made and his interlineation of the request to date the policies the same as the application can either contradict or modify the written agreements.

It is true that there is a rule of law that a company may be estopped from defeating a policy when its agent has written into the application of the insured, without his knowledge, a false statement of a material fact which conditions the insurance. *Laclede Mfg. Co.* v. *Hartford Ins. Co.*, 19 U. S. App. 510, 421, 9 C. C. A. 1, 8, 60 Fed. Rep. 351, 358-9; *Mutual Benefit Life Ins. Co.* v. *Robinson*,

19 U. S. App. 266, 7 C. C. A. 444, 58 Fed. Rep. 723; *Ins. Co.* v. *Russell*, 40 U. S. App. 530, 553, 23 C. C. A. 43, 54, 77 Fed. Rep. 94, 106; *Ins. Co.* v. *Wilkinson*, 13 Wall. 222, 225; *Ins. Co.* v. *Mahone*, 21 Wall. 152; *Ins. Co.* v. *Snowden*, 12 U. S. App. 704, 7 C. C. A. 264, 58 Fed. Rep. 342; *Kausal* v. *Association*, 31 Minn. 17, 21, 16 N. W. Rep. 430; *Dietz* v. *Ins. Co.*, 31 W. Va. 851, 8 S. E. Rep. 616. But this rule has no application to the interlineation made by the agent in this case because the request he wrote into the application misstated no fact which conditioned the insurance, but related solely to one of the terms of the contract which was still the subject of negotiation and concerning which each party had every opportunity after the interlineation was made to protect himself when the policies were presented for acceptance. The interlined request was immaterial because it was not complied with by the company and the policies do not rest upon it because it did not relate to a fact which conditioned the insurance, but to a term of the policies which then was, and continued to be the subject of negotiations, and because the company had the right, regardless of the request, to date the policies, which it tendered in its counter-proposition, when, and to write them on such terms as it saw fit and the deceased had an equal right to reject them when they were offered to him. The statement of the agent to McMaster when the applications were signed that the policies would insure him for thirteen months for only one premium, his interlineation of the request in the applications and all the acts and negotiations before the policies were accepted were alike immaterial, because they were merged in the written policies. The amount of the insurance, the amount of the premiums, the times when they should be paid, the time the insurance should continue were all expressed there for the very purpose of avoiding any question respecting them, and the previous negotiations were incompetent to contradict or modify the terms of the policies. "The writing must on familiar principles be held to embody the entire contract obligations of the parties, and all negotiations and colloquies of the parties preceding the execution of the writing were immaterial." *Grand Ave. Hotel Co.* v. *Wharton*, 49 U. S. App. 108, 112, 24 C. C. A. 441, 443, 79 Fed. Rep. 43, 45; *Ins. Co.* v. *Lyman*, 15 Wall. 664, 669; *Ins. Co.* v. *Mowry*, 96 U. S. 544, 547; *New York Life Ins. Co.* v. *McMaster*, 30 C. C. A. 538, 539, 540, 87 Fed. Rep. 63, 69, 71, and cases there cited.

It is earnestly contended, however, that if the previous parol negotiations and the representation of the legal effect of the policies do not modify them, still they are ambiguous and the familiar rules of construction that contracts of doubtful meaning should be construed more strongly against their framers and that the interpretation given them by the parties should prevail, are invoked to extend the life of these policies beyond the limit fixed by their terms. Rules of

construction are valuable aids in the interpretation of ambiguous expressions, inconsistent provisions and terms of doubtful meaning in agreements, but they serve only to befog and mislead the judgment, to defeat the intentions of the parties, to destroy the contracts they actually make and to make those for them to which they never consented when they are applied to agreements whose terms are plain and whose meaning is clear. They aid in the interpretation of ambiguous contracts, but they must not be permitted to abrogate or modify those that are clear and certain. When the language of an agreement is plain it must be held to mean what it expresses and no room is left for construction. *Green* v. *Chicago & N. W. Ry. Co.* 92 Fed. Rep. 873, 880; *Knox County* v. *Morton*, 32 U. S. App. 513, 516, 15 C. C. A. 671, 673, 68 Fed. Rep. 787, 789; *United States* v. *Fisher*, 2 Cranch, 358, 399; *St. Paul, M. & M. Ry. Co.* v. *Phelps*, 138 U. S. 528, 536; *Bedsworth* v. *Bowman*, 104 Mo. 44, 49; *Warren* v. *Barber Asphalt Paving Co.* 115 Mo. 572, 576; *Davenport* v. *City of Hannibal*, 120 Mo. 150. Before we resort to rules of construction let us see if there is any real ambiguity in the expressions or doubt of the meaning of these policies.

It is said that the applications are parts of the contracts, that they declare that the premiums are payable annually, that the first premiums were not paid and the policies did not take effect until December 26, 1893, that consequently the second annual premiums would not be due under the applications until December 26, 1894, and that this conclusion is inconsistent with the provision of the policies that the second premiums should become due on December 12 in each year. The argument seems to us more specious than sound. The applications did not become parts of the contracts until the contracts were made. They were not made until December 26, 1893, when McMaster accepted the policies and paid his first premiums. It is a custom so universal that it is within the knowledge of all men who have the slightest acquaintance with the business of life insurance to date the policies and to fix the day of the payment of the annual premiums earlier in the month than the day of the month upon which the policies happen to be accepted and the first premiums happen to be paid, because the policies are issued and dated at the home office of the company and some days usually intervene between that time and the date of their delivery to, and acceptance by the insured. There was therefore nothing unusual or extraordinary in the fact that the annual due date of the premiums was somewhat earlier in the month of December than the day in that month in which the policies were delivered to McMaster. Nor was the difference between policies, the due date of whose annual premiums was on December 12 and policies the due date of whose premiums was on December 26 very striking or important when the contracts were made and when both parties expected the premiums to be paid

according to their terms. The policies offered an extension of time of payment for one month in consideration of interest at the rate of five per cent per annum and that interest on the premiums on these policies for the eighteen days between December 12 and December 26 amounts to only twenty-six cents in each year. Thus it will be seen that the difference between the due date of the premiums and the date of the delivery of the policies was not extraordinary and the difference between an annual due date of December 12 and one of December 26 was not crucial when the contracts were made although now through the failure of the insured to comply with the terms of his contracts it has become grave. Turn now to the contracts. They consist of the applications and the policies and these must be read together. The applications provide that the premiums shall be paid annually or once in each year, but they do not provide on what day in each year they shall be paid and they are dated on December 12, 1893. The policies are dated on December 18, 1893, and they read that they are made in consideration of the applications "and in further consideration of the sum of twenty-one dollars, to be paid in advance, and of the payment of a like sum on the twelfth day of December in each year thereafter during the continuance of this policy," and that if the premiums are not paid within one month after December 12 in any year the insurance shall cease. The words which we have quoted which fix the dates when the premiums fall due are not tucked away on the backs of the policies but are written in plain terms upon their faces where a cursory reading would be certain to disclose them. The word "annually" which the applications contain signifies once in a year, but it does not signify at what time in the year, and it is by no means inconsistent with a stipulation in the same instrument which fixes that time. Leases, promissory notes, mortgages and many other contracts of like character provide for the payment of interest and installments of various kinds annually and also name the day in the years in which they shall be paid. One could not successfully maintain that these stipulations or the mere fact that the first installments were not paid until some days after they were due by the terms of the agreements could create any inconsistency or ambiguity in the terms, or any doubt of the meaning of such agreements. The policies and applications when read together are of the same character. They provide simply that the premiums shall be paid annually on the 12th day of December in each year and that if they are not so paid within one month after they are due the insurance shall cease. To our minds these provisions present no inconsistency no ambiguity, no doubt of their meaning and no basis for the application of rules of construction. The terms of the policies are clear and their meaning is certain.

83 Another position of counsel for the plaintiff in error is that this judgment should be reversed because the service of the notice of the amount of the second annual premiums, of the date when they fell due, and of the effect of a failure to pay them, was not well pleaded under the law of the State of New York upon this subject, which was made a part of the policies But the question is not here for our consideration. The service of the notice was clearly averred, whether with such accuracy and particularity that the plea would have been impervious to a demurrer it is not necessary to inquire, because this pleading was not challenged below and the court heard the evidence upon this subject without objection and found that the notice was sent "in accordance with the requirements of the statutes of the State of New York." When a case is tried by a Federal court without a jury and the resulting judgment is brought by a writ of error to an appellate court for review it is only "the rulings of the court in the progress of the trial of the case" and the sufficiency of the facts found to support the judgment that can be reviewed. Rev. Stat. section 700. In such a case this is a court for the correction of the errors of the court below only. As the question of the sufficiency of this pleading was never brought to the attention of, or ruled upon by the trial court, it certainly committed no error regarding it and there is nothing in this point for us to review or correct. *Mercantile Trust Co.* v. *Wood*, 19 U. S. App. 566, 571, 8 C. C. A. 658, 660, 60 Fed. Rep. 346, 348; *Bowden* v. *Burnham*, 19 U. S. App. 448, 8 C. C. A. 248, 59 Fed. Rep., 752; *Norris* v. *Jackson*, 19 Wall. 125, 127; *Ins. Co.* v. *Folsom*, 18 Wall. 237, 249; *Cooper* v. *Omohundro*, 19 Wall. 65, 69; *Martinton* v. *Fairbanks*, 112 U. S. 670; *Lehnen* v. *Dickson*, 148 U. S. 71. The judgment below is

Affirmed.

THAYER, Circuit Judge, concurring.

I concur in the order affirming the judgment below for the following reasons: Until the premium was paid on the policy in suit and the policy was delivered no agreement had been entered into which was binding either upon the insurer or the insured. Up to that point either party had the right to retire from the negotiation without liability to the other. When the policy was delivered and the negotiation was thereby consummated the policy became the best and, except in case of its loss or destruction, the only evidence of the agreement between the parties and in the absence of fraud or mistake neither party can be permitted to say that he did not assent to it. The acceptance of the policy by the insured is the highest evidence of his assent. The policy in terms provided that the subsequent premiums thereon during its continuance should be payable on December 12 annually but that a grace of one month would be allowed after the premium

fell due on condition that interest at the rate of five per cent was paid for the time the premium might remain overdue. These provisions of the policy were definite and certain and the insured, in view of his acceptance and retention of the policy, is presumed in law to have assented to them. It is true that he was privileged to avoid the provision of the policy fixing December 12 as the annual premium day by proof of fraud on the part of the insurance company or its agent, but I do not understand that the finding by the learned judge of the trial court establishes any such fraud as will in law serve to overturn the plain language of the contract. It is not claimed that the agent's request to the company to have the policy dated, when it should be issued, as of the same day as the application, was made with an intent to defraud the insured. Neither did the trial court find that the agent intended to deceive or mislead the insured when in response to the inquiry whether the policy was as represented and would insure him for thirteen months, he answered in the affirmative. Bearing in mind that the policy contained a stipulation allowing one month after each subsequent premium became due within which it might be paid, the company's agent doubtless believed that the policy did secure insurance for thirteen months counting from the premium day named in the policy and that it was in all respects such a contract as he had engaged to deliver. The findings, to my mind, do not create a suspicion of intentional deceit either on the part of the insurance company or its agent. Moreover, the finding shows that even if the deceased had not before read his policy he was distinctly advised at least a week before his death, which appears to have occurred on January 18, 1895, that by the terms of the policy the period of grace limited therein would expire on January 11, 1895, the premium having become due on the 12th day of the preceding month. The finding does not disclose that he made any objection at the time to this construction of the policy, which was clearly in accordance with its terms. It is a sound rule of law founded on the highest considerations of public policy which requires a person to read a contract before signing or accepting it, if he can read. Unless this rule is enforced written agreements of all kinds will become valueless as instruments of evidence. The duty resting upon one to read a contract before signing or accepting it is not so imperative however that if omitted it will render one bound under all circumstances by an agreement which he has signed or accepted. If one party to an agreement resorts to any fraud, trickery or artifice to prevent the opposite party from reading it before signing or accepting it, or knowingly makes any false representations concerning the terms of the agreement, or intentionally and with design to overreach the opposite party, so drafts a contract that it does not express the terms of the previous oral understanding or agreement—in all of these cases the negligence of one who signs or accepts a contract

without reading it is more excusable than the fraud of the opposite contracting party. But when the evidence shows no fraud of the kind last indicated nor mistake in drafting it, it is a wholesome rule which holds a party bound by a contract which he has signed, or accepted and retained in his possession for a considerable period, and which prohibits him from avoiding its provisions by pleading his own negligence. In the case at bar I am of opinion that no such fraud is disclosed by the findings as would justify a court in ignoring the plain language of the policy.

CALDWELL, Circuit Judge, dissenting.

The right decision of this case does not depend upon any technicality of law.

It is a case in which common sense and common honesty, and legal sense and legal honesty are at one.

It arises upon a contract of life insurance which must be interpreted according to the settled canons for the construction of such instruments, and the determination of the rights of the parties thereunder. In every contract of insurance the law prescribes to each party the observance of the strictest integrity and truthfulness. Insurance law when rightly expounded is always in harmony with honesty and sound morality. At the very beginning of insurance law in England there was infused into it through the influence of the civil law a different spirit from that which prevailed in other branches of the common law. Neither the maxim *caveat emptor* nor its spirit has found a lodgment in the law of insurance. If there is any part of our jurisprudence which produces exact justice in each individual case, it is the law of insurance. It is founded on truthfulness, honesty, and fair dealing. It never affords shelter or protection for fraud, falsehood or deception. In no other branch of the law, not even the law merchant, have the courts shown such merited deference to the rules, usages, and customs that prevail in the conduct of business. Insurance contracts are uniformly interpreted and enforced in harmony with the usages, business methods and common sense of honest business men, and the moral sense of all reputable men.

At the threshold of the case it would be well to call attention, once for all, to certain fundamental and indisputable propositions:

1. That the facts found by the lower court must be accepted by this court as absolute verity.

2. That the failure to find any fact, or the insufficient or imperfect finding of any fact, essential to maintain the judgment of the lower court is fatal to it.

3. That a statement of the legal effect of a document or paper which is not in the record nor made part of the findings, nor its contents anywhere set out or disclosed, is not a finding of fact, but a mere conclusion of law upon the legal effect of an undisclosed document, and hence of no effect.

4. That Smith, who was soliciting these policies for the company, is under the Iowa law the agent of the company, "anything in the application or policy to the contrary notwithstanding"; and his statements and agreements in the course of his business in soliciting and delivering the policies and receiving the premiums are, in law, the statements and agreements of the company itself. *Assurance Society* v. *Clements*, 140 U. S. 226; *Indemnity Co.* v. *Berry*, 1 C. C. A. 561; *Cook* v. *Association*, 74 Ia. 746; *Continental Life Ins. Co.* v. *Chamberlain*, 132 U. S. 304; *New York Life Ins. Co.* v. *Russell*, 77 Fed. Rep. 94.

Contracts of life insurance are *sui generis*. A policy consists of a printed form which the company has framed and adopted for its use, and uses in all cases without change or variation. All that is necessary to be done to make one of these policies a completed instrument is to insert in the blanks left for that purpose, the name of the insured, the term of insurance, the amount and time of payment of the premium, the date of the policy and the signature of the company. The insured never sees the policy during its preparation, and never signs it. What he does see and sign is an application for the policy. This application is also on a printed form which the company has framed and adopted for its use and which it uses in all cases, and which is made part of the policy and is as obligatory on the parties as any other part of the policy. This application contains numerous questions which the insured must answer, and warrant his answers "to be full, complete and true." The insured did this and it is not claimed that his answers were not "full, complete and true." But the contention is that this duty to answer questions truthfully is not reciprocal; that while the applicant for insurance must answer the company's questions truthfully, the company has the privilege of knowingly returning false answers to the applicant's questions, and profiting by such false answers at the expense of the benificiary in the policy.

From the beginning to the end of the majority opinion, a policy of insurance is treated as though it were a contract for which there was no precedent and related to a subject about which neither of the parties ever before contracted, and in the preparation of which each party participated and had an equal voice and the provisions of which were as well known to one party as to the other, and which was signed by both; and the court applies to a contract of insurance, rules as harsh and technical as any that would be applied under the rule of *caveat emptor* to a trade between two horse jockeys.

What are the facts established by the findings? The seventh finding of fact is:

"By the express understanding had between F. W. Smith, the agent of the New York Life Insurance Company, and Frank E. McMaster, when the application for insurance was signed, it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies and that the contract of insurance was not to take effect until the policies were delivered."

Here we have a definite, precise and concluded contract as to *when* the policies were to take effect. They were "not to take effect until the policies were delivered." This oral agreement as to when the policies should take effect was in complete accord with the express stipulation of the application, which is: "That any policy which may be issued under this application shall not be in force until the actual payment to and acceptance of the premium by said company." The premiums were paid and the policies delivered on the 26th day of December, 1893, and from that date, and not before, the policies were "in force" by the explicit provisions of the policies themselves, as well as by the terms of the oral agreement. The date when the policies took effect being settled beyond all cavil, the term or period of their duration is the next question. Each policy provided that:

"After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5 per cent per annum for the number of days during which the premium remains due and unpaid. During the said month of grace, the unpaid premium with interest as above, remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance."

When had the policies "been in force three months"? As we have seen by the terms of the oral agreement, the policies were not to take effect until they were delivered, and the policies themselves stipulated that they should not be in force until the actual payment to and acceptance of the premiums by the company, which was coincident with the delivery of the policies. It is clear, then, that the policies went into effect and were "in force" on the 26th day of December, 1893, and that three months from that date—the policies having remained in force—the insured became entitled to the grace of one month in the payment of subsequent premiums, which extended the time of the payment of the next annual premiums to the 26th of January, 1895. The insured died on the 18th of January, 1895, eight days before the policies could be declared forfeited for the nonpayment of the second annual premium. There was never any thought or suggestion that the policies would not insure the life of the ap-

plicant for thirteen months from the date of the payment of the premiums. Confessedly, the period of twelve months and *seventeen days* was never in the mind of either party, or ever thought of by either party. From the very inception of the business it had been represented and understood that the policies would insure the life of the applicant for thirteen months from the time of the payment of the premiums and the delivery of the policies. This is conclusively shown by the third and fourth findings of fact, which are:

"3rd. That in December, 1893, F. W. Smith, an agent for the New York Life Insurance Company residing at Sioux City, Iowa, solicited Frank E. McMaster to insure his life in that company, and as an inducement to taking the insurance, pressed upon McMaster the provision adopted by the company and set forth in the circulars issued by the company, and printed on the back of the policies issued by the company under the heading 'Benefits and provisions referred to in this policy' in the following words: 'After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent per annum for the number of days during which the premium remains due and unpaid; during said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance.'

"4th. Relying on the benefits of this provision and in the belief that if he accepted a policy of insurance upon his life, from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed since the last payment of the annual premium, the said Frank E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on and attached to the petition, the same being made part of this finding of facts."

The insured wanted the full benefit of the thirteen months insurance, reckoning from the date of the payment of the first annual premiums; upon this subject he had been exacting and tenacious from the beginning, and to that end had required the agent to agree that the contract of insurance should "not take effect until the policies were delivered." And as we have seen, this condition was carried into and repeated in his application, which declares the policy "shall not be in force until the actual payment of the premium." But this was not all the insured did to make it sure that he would be insured for thirteen months from the payment of the premiums and the delivery of the policies. The ninth finding of fact is:

"The five policies enclosed in envelopes on or about December 26th, 1893, were taken by F. W. Smith, the agent of the defendant company to the office of Frank E. McMaster who asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him and thereupon McMaster paid the agent the full first annual premium or the sum of twenty-one dollars on each policy and without reading the policies he received them and placed them away.

"The agent did not in any way attempt to prevent McMaster from reading the policies and he had the full opportunity for reading them, but in fact did not read them and accepted them on the statement of the agent of the company as hereinabove set forth."

The question propounded by the applicant to the insurance agent was not an idle inquiry, and the answer to it not a mere casual statement. Nor was the answer, as is claimed, "preliminary information" or a mere "opinion" as to the legal effect of the policies. There was nothing preliminary about it, and it was not a mere expression of opinion, but a clear, positive, and distinct statement of a material, existing fact. The answer given by the agent can only appear on paper in words, but it was doubtless accompanied by "the story of looks and message of voices" common with soliciting agents which cannot be put on paper, but which add force and emphasis to one's utterances and induce confidence in his assurances. The most persuasive and effective falsehoods are told in acts, not in words.

But it is immaterial whether the answer of the agent was inspired by a fraudulent purpose or was the result of an honest mistake. Confessedly the minds of the parties never met and agreed upon the contract expressed in the policies. A mistake, no more than a fraud of the company or its agent, can bind the insured to a contract he never made.

No claim is made that the policy conforms to the terms of the application. The contention of the majority is that after receiving the application the insurance company "made a counter-proposition," and it is upon this alleged counter-proposition, differing as is confessed in a material respect from the terms of the application, that it is sought to uphold the clause of the policies over which this controversy arises. This claim is thus stated in the majority opinion:

"The applications were nothing but a proposition to take insurance. They were not contracts, but mere requests for, or a proposition to take policies. The company was not bound to grant these requests or to accept the proposition. It had the right to reject them *in toto* or to reject some parts of them and to make a counter-proposi-

tion. It took the latter course. It rejected some parts of the applicant's proposition and made a counter-proposition." When, where, and how did the company make "a counter-proposition" to that contained in the application? There is no finding of fact to that effect, and for the facts in this case this court cannot look beyond the facts found by the lower court, it can add nothing to and take nothing from the facts so found. The application was on the company's standard form and the propositions and conditions contained therein, were the propositions and conditions the company itself had framed and to which it required the assent of the applicant for insurance as a condition of issuing the policies. And when the applicant subscribed to the application and delivered it to the company so far as related to the conditions and stipulations therein contained, the minds of the parties had met and were at one. It is not true that the company ever advised the insured that it had changed the propositions and conditions which it had itself inserted in his application, or that it would not insure the applicant on the basis of the propositions and conditions contained in the application. Nor did the company, at any time or place, offer or propose any other terms for the insurance. On the contrary, upon the receipt of the application, it made out, signed and transmitted to its agent policies of insurance which the agent assured the applicant conformed to their agreement and the requirements of the application. But in violation of the agreement that the policies would insure the applicant for thirteen months from the date of their delivery and the payment of the premiums, and in violation of the terms and conditions of the application which guaranteed policies for the same period, the insurance company had secretly and without the knowledge of the insured, inserted a clause in the policies which reduced the term of insurance to twelve months and seventeen days, and when it delivered the policies this fact was not only concealed from the insured, but he was told by the agent that the policies insured him for thirteen months—and this is what the majority of the court call making "a counter-proposition." What the court is pleased to call "a counter-proposition" was a fraudulent concealment of the fact that the policies varied in a material respect from the agreement made with the agent, and the requirements and conditions of the application. A counter-proposition is an offer *openly* made by one of the parties, of something for consideration and acceptance as a substitute for, or a modification of, a proposition previously made by the other party.

It is further said in the opinion of the court that, "the word 'annually' which the application contains, signifies once in a year, but it does not signify what time in a year." But the appl cation provided that the policies should not be in force until the first annual premiums were paid, and they were paid on the 26th of December,

1893. That this was the payment of annual premiums is conclusively established by the finding of the court that it was the payment in full of the "first annual premium." Obviously then, the next annual premium would be due one year from that date. Annual in this connection means on the recurrence of the same day in each year thereafter and not at some other or uncertain time during the year. Therefore, when the company inserted in the policy a clause making the premiums payable at a different time it inserted a provision in direct conflict with the terms of the application and the agreements of the parties. It is a fact found by the court that:

"There now appears on the face of the application, interlined in ink, the words, 'Please date policy same as application.' These words were not in the application when it was signed by McMaster, but after the signing thereof, they were written into the application by F. W. Smith, the agent of the New York Life Insurance Company, without the knowledge or assent of Frank E. McMaster, and were so written by the agent in order to secure to the agent a bonus which the company allowed to agents for business secured during the month of December, 1893, and it does not appear that Frank E. McMaster ever knew that these words had been written into the application and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company and was acted on by the company."

When the insured signed the application and delivered it to the agent it was a completed document. It was the insured's application, and neither the company nor its agent could lawfully add to or take from it. The company could accept or reject the application as made, but it could not alter it. The insertion of this clause by the insurance agent after the insured had signed and delivered the application, and without his knowledge and consent, was an illegal act if not a plain and palpable forgery. It was an act which cannot prejudice the insured or benefit the company. No one can profit by his unauthorized alteration of an instrument after the discovery of the fact. The company evidently understood by this clause interpolated into the application by the agent that he wanted the 12th day of December fixed as the date for the payment of the annual premiums, and the company accordingly fixed that date in the policies as the time for the payment of the annual premiums and dated the policies their true date, namely, the 18th of December. By this extraordinary and unheard of action, the insured is made to pay a premium on the policies from the 12th of December whereas the policies were not signed or executed by the company until the 18th of December, and by their terms did not take effect until the payment of the first annual premiums on the 26th of December. Beyond all doubt, the applicant was not insured from the 12th of December, and yet from that day it claimed the thirteen months must be reckoned, and we are told that

they are policies not for thirteen months but for twelve months and seventeen days, a most uncommon term for life policies, which are rarely or never issued for a fraction of a month.

In *Equitable Life Association* v. *McElroy*, 28 C. C. A. 365, the jury found there was a valid verbal agreement of life insurance and that time was given for the payment of the premium, but a majority of the court in that case said: "The almost invariable custom is for the companies to make no contract and to incur no liability to insure the life of any man until a premium has been paid. Accordingly, where no policy of life insurance has been issued and no premium has been paid, there is a strong presumption that there was no contract and no intention to contract otherwise than by a policy made and delivered upon the simultaneous payment of a premium," and the verdict of the jury was set aside and a recovery denied. But when in this case the insured claims and proves by an express provision of his application now a part of the policies, that the policies were not to be in force for any purpose until the premiums were paid and the policies delivered, the court holds that as against the insured and for the purpose of shortening the term of insurance and defeating a recovery on the policies, that the policies were in force six days before they were signed, and fourteen days before they were delivered and the premiums paid. It is not pretended, however, that the applicant's life was insured during this time—the policies were only in force to shorten the term of his insurance, and to that extent relieve the company from liability. As applied by the court in this case, there is a want of reciprocity in the rule laid down in *Equitable Life Association* v. *McElroy*, *supra*, which does not commend it to our sense of right and justice. Judge Shiras in his opinion forcibly points out the injustice and unreasonableness of this claim. He says:

91

"If the theory contended for on behalf of the company is correct, it follows that by the device of making the second and subsequent payments due on the 12th day of December, instead of the 18th, the date of the policies, the insured and his estate are deprived of the benefit of the month's grace which McMaster was assured he would be entitled to, when he applied for the insurance. Furthermore, if this construction of the policy is sustained, it makes it possible for the company after using the month's grace as an arrangement to secure insurance, then to escape the obligation by the simple device of so writing the policies as to make the second payments come due a month in advance of the date of the policies." *McMaster* v. *New York Life Ins. Co.* 78 Fed. Rep. 33.

And again:

"Can there be any doubt that when McMaster received the policies dated December 18, 1893, and paid one year's premiums thereon, he was justified in assuming that, if he died within one year from the

date of the policies, his estate would receive the indemnity which it was his purpose to secure, even though the policies did not contain the provision giving one month's grace on subsequent payments. Suppose McMaster had died on the 1st of December, 1894, less than one year from the date of the policies, would it be open to the company to deny liability on the policies on the ground that it had put in the policies a provision that the second premiums were payable on October 1, 1894? That is exactly the claim now made by the defendant company. If the company, after accepting a proposition to insure McMaster on the basis of annual premiums, can make the second premiums payable in six days less than a full year—which is its claim in the present case—it could have made the second premiums payable in three or six months, and would thus change the policy from one wherein the premiums were payable annually into one wherein the premiums were payable quarterly or semi-annually." *McMaster* v. *New York Life Ins. Co.* 90 Fed. Rep. 40.

The interpolated clause in the policies contradicts and is inconsistent with the stipulations and conditions of the application, which are a part of the policies and the only part which the assured ever saw and assented to. It is a settled canon for the construction of policies of insurance, that when they contain contradictory, conflicting or inconsistent provisions, effect will be given to the provisions most favorable to the insured; and in cases where their construction is doubtful, the construction most favorable to the insured will be adopted. *National Bank* v. *Ins. Co.* 95 U. S. 673; *Grace* v. *American Central Ins. Co.* 109 U. S. 278; *Moulor* v. *American Life Ins. Co.* 111 U. S. 335; *American Surety Co.* v. *Pauly*, 170 U. S. 133; *Traveller's Ins. Co.* v. *McConkey*, 127 U. S. 661, 666; *Thompson* v. *Phenix Ins. Co.* 136 U. S. 287, 297; *Imperial Fire Ins. Co.* v. *Coos County*, 151 U. S. 452, 462.

No notice is taken of this rule by the majority of the court, although it is exactly applicable to this case and decisive of it. In *McGlother* v. *Prov. Mut. Acc. Co.* 32 C. C. A. 318, the majority of this court characterized this fundamental rule of construction which has been repeated, affirmed, applied and enforced by the Supreme Court of the United States in scores of cases, as a "much abused rule." As the rule has been more frequently and effectively applied by the Supreme Court of the United States than any other court, it may be inferred from the remark quoted that the doctrine of the Supreme Court does not meet the approval of the majority of this court, and will not be applied by them in any case. Certain it is that they have done more than ignore the rule in this case—they have *inverted* it, and where the provisions of the policy are inconsistent or conflicting, they have given effect to the provisions most favorable to the insurance company, and wherever the meaning of the policies is doubtful, they have resolved the doubt in favor of the insurance company.

The company made no objection to the stipulations and conditions of the application or to the agreement made with its agent, and made no counter-proposition, but proceeded to issue and tender its policies upon the application as made. When the policies were tendered under these circumstances, the insured would have been entirely justified in paying the premiums and accepting the policies without reading them. He had a right to presume that the period of insurance named in the policies conformed to the agreement and to the stipulations and conditions of his application, and to that effect are the authorities, as we shall presently see. When the period of insurance has been agreed upon, it is the almost universal usage for business men to pay the premium and accept their policies without reading them. Under the doctrine laid down by the majority, if a man were to make a written application for a policy of insurance on his house for one year and the company should write the policy for one month only, and tender that and receive a year's premium, and the insured going on the reasonable assumption that the policy conformed to his application, should accept the policy and put it away in his safe without reading it, his policy would be effective for one month only. But the insured in this case did not, as he might well have done, rest on the reasonable assumption that the policies insured him for the perion of thirteen months as agreed upon and called for by the stipulations and conditions of his application, but he applied to the company's agent to know if they did so insure him and was answered that they did; and thereupon, in reliance upon the truth of this answer and in the belief that the policies insured him for thirteen months as his application called for, he paid the first annual premiums and laid the policies away without reading them.

Upon this state of the case the court holds that by the mere acceptance and retention of the policies without reading them, the insured is estopped to show the truth of the transaction. The question is not whether the finding of facts establishes the mistake or fraud, but whether the mistake or fraud being conclusively established by the finding of facts, the court will declare the insured is estopped from availing himself of the truth by the mere receipt of the policies and putting them away without reading them in reliance upon the truth of the agent's answer and the stipulations of his applications. It must not be forgotten that there is no claim or pretense that the policies in fact expressed the contract of the parties—the finding of facts precludes any such claim—the contention is, that by receiving the policies under the circumstances mentioned the insured is "conclusively presumed" to have assented to all their provisions and will not be heard to say to the contrary. The rule for the application of estoppels is thus inverted and applied in favor of the company, when it is obvious that it is the company that is estopped from setting up

the defense relied on. Estoppels are invoked to prevent and relieve from fraud, not to shield and protect it. The most frequent occasion for invoking the doctrine is where one party makes a representation upon the faith of which the other party acts and pays money or changes his position or refrains from doing something he otherwise would do. In all such cases the party making the representation is estopped from contesting its truth. It will be perceived at a glance that the estoppel in this case applies to the insurance company and not to the insured. The insured made no representation to the company, and the company parted with no money or other valuable thing on the faith of any false statement that he made. Nor did it do or omit to do anything on account of the insured putting away the policies without reading them. But on the faith of the solemn assurance of the company's agent that the policies insured him for thirteen months, the insured parted with his money and refrained from reading his policies and from taking out policies in other companies Upon the faith of the truth of the agent's representations, the insured rested confidently in the belief that he had made provision for his family in the event that he died at any time within thirteen months from that date. It is said the insured was guilty of culpable negligence in placing any reliance on the truth of the agent's statement. But the law will not hear any man complain that another has too implicitly relied on the truth of things he has himself stated. He will not be heard to say, "It is true I misrepresented the facts to the insured and by so doing induced him to pay for and accept without reading policies which insured him for a less period than that agreed upon, but he ought not to have trusted to my word, he ought to have known I was unworthy of belief."

The rule of the court obliterates all distinction between truth and falsehood in the dealings of men. It establishes the doctrine that the law has no partiality for truth and no prejudice against falsehood. It applauds and approves an end obtained by falsehood and fraud as a high exhibition of business tact and skill, and reserves its censures for the innocent and trusting victim of the fraud because, forsooth, he accepted as true the word of the man he was dealing with; and it permits the party who made the false representation to avail himself of his own falsehood to the prejudice of the man who trusted him. It makes confidence and bunco games respectable and elevates the sharper who practices them to a plane of equality with honest and reputable business men. It is a rule at which all rascaldom will rejoice, and all honest and trustful men take alarm. It stimulates falsehood and deceit by the grant of impunity, and destroys confidence among men. It converts written contracts which were designed to prevent fraud into the most powerful agencies for the perpetration and protection of fraud. In this case the insurance company, in effect, receives a reward of $5,000 for its falsehood and fraud, and a

penalty of $5,000 is imposed upon the beneficiary named in the policy because the insured trusted in the truth of the company's representations.

It is undoubtedly true that a written contract is presumed to express the agreement of the parties—but this is not a conclusive presumption, and the exceptions to the rule are as well understood and clearly defined as the rule itself. No writing, however solemn, can be made a vehicle for fraud or convert a mistake into verity. The case at bar, upon the facts found, falls within the well-defined exception to the rule as shown by all the authorities. No apology is made for demonstrating the truth of this assertion by somewhat extended quotations from controlling authorities.

In *Insurance Company* v. *Wilkinson*, 13 Wall. 222, the insured had signed and delivered to the insurance company an application for a life policy, in which the agent of the company had written down a false answer to a question which the insured had declined to answer. The insured, without knowing the agent had written down an answer to this question, signed the application without reading it, and it was made the basis of the policy which was issued. The company made the same contention in that case that the company makes in the case at bar, namely, that parol evidence could not be admitted to prove the facts and that the insured was conclusively bound by the contents of his written application. But the Supreme Court held that the act of the agent in writing down the answer was to be imputed to the company and that it could not estop the insured from showing the facts by parol evidence by its own fraudulent act though he had signed the application without reading it. In delivering the unanimous judgment of the court, Mr. Justice Miller said:

"Passing then to the second branch of the case. The defendant excepted to the introduction of oral testimony regarding the action of the agent, and to the instructions of the court on that subject; and assigns the ruling of the court as error on the ground that it permitted the written contract to be contradicted and varied by parol testimony.

"The great value of the rule of evidence here invoked cannot be easily overestimated. As a means of protecting those who are honest, accurate, and prudent in making their contracts, against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability to misconception, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident, or mistake, or fraud, the principle has been

long recognized that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. A rule of evidence adopted by the courts as a protection against fraud and false swearing, would, as was said in regard to the analogous rule known as the statute of frauds, become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. * * * It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels *in pais*. The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim. It has been applied to the precise class of cases of the one before us in numerous well-considered judgments by the courts of this country."

In *Equitable Insurance Co.* v. *Hearne*, 20 Wall. 494, the terms of the policy were agreed upon by letter. The policy issued varied from the agreement, the insured accepted and retained it without reading it and the company contended that having done so, he was bound by its provisions, although they differed from the terms of the agreement; but the court said:

"The policy was intended to put the contract in a more full and formal shape. The assured was bound to read the letters of the company in reply to his own with care. It is to be presumed he did so. He had a right to assume that the policy would accurately conform to the agreement thus made, and to rest confidently in that belief."

The company in that case seems not to have thought of the expedient of calling the policy which varied from the terms of the agreement, a "counter-proposition."

In *Palmer* v. *Hartford Insurance Company*, 54 Conn. 488, 509, 510, the court say:

"But if the underwriter solicits a person to purchase of him indemnity against loss by fire, and if they unite in making a written contract of all the terms, conditions and stipulations, which are to become a part of or in any way affect the contract, and if the underwriter promises to make and sign a copy thereof, and deliver it as the evidence of the terms of his undertaking, and if a material and variant condition is by mistake inserted, and the variant contract is

delivered, and the stipulated premium is received and retained, the court will not hear the claim that he is entitled to the benefit of the variant condition, when the other party had neither actual nor imputed knowledge of the change. In his promise to make and deliver an accurate copy, there is justification before the law for the omission of the other party to examine the paper delivered, and for his assumption that there is no designed variance. A man is not for his pecuniary advantage to impute it to another as gross negligence, that the other trusted to his fidelity to a promise of that character.

"The rule of law that no person shall be permitted to deliver himself from contract obligations by saying that he did not read what he signed or accepted, is subject to this limitation, namely, that it is not to be applied in behalf of any person who by word or act has induced the omission to read."

In *Hay* v. *Star Fire Ins. Co.* 77 N. Y. 235, Chief Justice Church, speaking for the Court of Appeals, said:

"It was bad faith on the part of the defendant to change so radically the terms of the policy, and deliver it as a policy simply renewing the old one without notice of the change. A party whose duty it is to prepare a written contract, in pursuance of a previous agreement, to prepare one materially changing the terms of such previous agreement, and deliver it as in accordance therewith, commits a fraud which entitles the other party to relief according to the circumstances presented. * * * Policies of fire insurance are rarely examined by the insured. The same degree of vigilance and critical examination would not be expected or demanded as in the case of some other instruments. It is found that the plaintiff did not in fact examine the policy until after the fire, when for the first time, he was informed of the peculiar terms of the provision."

In *Bidwell* v. *Astor Insurance Company*, 16 N. Y. 266, the court said:

"That the contract of insurance agreed to be made by the defendants was such in its terms as the plaintiffs have alleged in their complaint, has been found by the judge and is conclusive upon us. The fact on which the appellants rely, that the policy actually made out was in the plaintiff's hands for a considerable time, and until after the loss had occurred, was a circumstance to be weighed by the judge as bearing upon the truth of the plaintiff's allegation that the policy did not pursue the contract. It has undoubtedly been considered by the judge, and his judgment has been given, notwithstanding that circumstance, in favor of the plaintiff. There is no rule of law which fixes the period within which a man may discover that a writing does not express the contract which he supposed it to contain, and which bars him of relief for delay in asserting his rights short of the period fixed by the statute of limitations."

In *Albany City Savings Institution* v. *Burdick*, 87 N. Y. 40, the Court of Appeals said:

"It has certainly never been announced as the law in this State that the mere omission to read or know the contents of a written instrument should bar any relief by way of a reformation of the instrument on account of mistake or fraud. It is the general rule that where a written instrument fails to conform to the agreement between the parties in consequence of the mutual mistake of the parties, however induced, or the mistake of one party and fraud of the other, a court will reform the instrument so as to make it conform to the actual agreement between the parties."

The court then cites the case of *Botsford* v. *McLean*, 45 Barber 478, where in a transaction one of the parties was to execute four notes bearing interest. He executed and delivered four notes, but only two of them bore interest. The payee without reading the notes accepted them and put them away. The court proceeds:

"The vendor, seeing that two of the notes were on interest, assumed that the other two were also on interest and accepted the same believing that all were properly drawn. The purchasers, knowing that two of the notes were so drawn as not to bear interest purposely abstained from calling the vendor's attention to the fact. It was held that there was a mistake on one side and fraud upon the other, and that the two notes should be reformed so as to conform to the actual agreement between the parties, and the decision was affirmed in this court in 1870. In that case there was a certain degree of negligence in not reading the two notes. It is said by the learned counsel for the plaintiff, in the argument before us, that there was artifice used in that case to induce the plaintiff to believe that the two notes were drawn with interest, that artifice being in drawing and placing before the plaintiff the first two notes payable with interest, by which the payee was thrown off his guard; but that circumstance was not the basis of that decision and does not distinguish that case from this. There was nothing there to prevent the payee from reading the notes, and he had abundant opportunity to do so. If he had read them, the mistake and fraud would have been discovered. There was at most, in substance, the representation that the two notes were drawn with interest; and if that was false, the means were at hand for its easy and ready detection. So in this case; Mrs. Burdick intrusted Martin to draw the deed, and he was bound to have it drawn so as to express the agreement between the parties; and when he brought and delivered the deed to her, it was in effect a representation to her that the deed had been so drawn. She was not bound to assume that he might be practicing a fraud upon her, or representing a falsehood, and she cannot be charged with negligence in believing confidently that he was acting in good faith and telling the truth.

In omitting to read the deed, she was no more in fault than the plaintiff was in the case above cited, in omitting to read the two notes.

"It is certainly not just that one who has perpetrated a fraud should be permitted to say to the party defrauded when he demands relief that he ought not to have trusted or believed him. * * * If the rule were otherwise, the unwary and confiding, who need the protection of the law the most, would be left a prey to the fraudulent and artful practices of evil-doers."

In *Kister* v. *Insurance Co.* 128 Pa. State, 553, the Supreme Court of Pennsylvania say:

"We cannot say that the law, in anticipation of a fraud upon the part of a company, imposed any absolute duty upon Kister to read his policy when he received it, although it would certainly have been an act of prudence on his part to do so. *Howard Ins. Co.* v. *Bruner*, 23 Pa. 50; *Insurance Co.* v. *Wilkinson*, 13 Wall. 222. One thing is certain, however, the company cannot repudiate the fraud of its agent, and thus escape the obligations of a contract consummated thereby, merely because Kister accepted in good faith the act of the agent without examination."

In *Gristock* v. *Insurance Co.* 87 Mich. 428, the Supreme Court of Michigan say:

"Plaintiff had a right to rely upon the assumption that his policy would be in accordance with the terms of his oral application. If the defendant desired to make it anything different, it should, in order to make it binding upon plaintiff, under the authorities in this state, have called his attention to those clauses which differed from the oral application."

In *Strohn* v. *The Detroit and Milwaukee Railway Co.* 21 Wis. 562, the plaintiff had a verbal agreement with the defendant railway company as to the terms of shipment of a quantity of freight. The freight was delivered to the railway company and afterwards, upon demand, the company delivered to the plaintiffs bills of lading therefor. These bills of lading contained conditions of shipment inconsistent with the verbal agreement of the parties. The plaintiffs having received and retained these bills of lading without reading them or knowing their contents, the railway company insisted that they were bound by the conditions contained in the bills of lading, which had been received without objection. In answer to this contention, the court said:

"Having previously entered into a special verbal agreement, he may rightfully assume, in the absence of notice to that effect, that it is embodied in the paper or receipt, or at least that the receipt contains nothing contrary to it. It is in the nature of a direct fraud or cheat for the company or its agents, after having entered into a verbal agreement, thus wrongfully to insert a contract of an entirely differ-

ent character, and present it to the party without directing his attention expressly to it and procuring his assent. It is no answer for the company in such a case to say that the other party should have been more diligent and watchful, and should have detected the fraud. So long as he is ignorant of the new conditions, and does not assent to them, the contract in writing is not consummated, and parol evidence may be received." And to the same effect is *Boorman* v. *American Express Co.* 21 Wis. 154.

In *McElroy* v. *British America Assur. Co.* 94 Fed. Rep. 990, 1000, the Circuit Court of Appeals for the Ninth Circuit say:

"It would certainly have been an act of prudence on his part to read the entire policy, but his neglect to do so cannot excuse the company for the default of the agent in not writing the contract in accordance with the representations made by the insured. The insured had a right to rely upon the agent's performing his duty of making the contract in conformity with the information given; and the agent's failure to do so, whether the result of a mistake or of a deliberate fraud, cannot operate to the prejudice of the insured. The contract of insurance is pre-eminently one that should be characterized by the utmost good faith on both sides."

In *Fitchner* v. *Fidelity Mutual Fire Association*, 103 Iowa, 276, the Supreme Court of that state say:

"The insured ordinarily rely upon the agent to properly set out the facts in the applications, and Laub did as men usually do, in assuming that the defendant's agent had done his duty. *Stone* v. *Insurance Co.*, 68 Iowa, 737; *McComb* v. *Insurance Co.* 83 Iowa, 247. The mere failure of the assured to read his application, or the copy of it in the policy, does not establish negligence. *Bennett* v. *Insurance Co.* 81 Iowa, 321; *Donnelly* v. *Insurance Co.* 70 Iowa, 693; *Boetcher* v. *Insurance Co.* 47 Iowa, 253. Nor is the mere omission to read the policy negligence. *Barnes* v. *Insurance Co.* 75 Iowa, 11; *Jamison Insurance Co.* 85 Iowa, 229; *Boetcher* v. *Insurance Co. supra.* Laub had no reason to suppose the policy and application were drawn differently than understood."

Citations to the effect of the foregoing might be multiplied indefinitely, but the excerpts quoted are enough to establish beyond all controversy that the doctrine of the majority is not the law. No verbal dexterity can weaken or evade the overwhelming force of these decisions. They conclude the question. Not one case cited by the majority is an authority *on the facts of this case.* Even the decision of this court when this case was here on a bill to reform the policy, is not in point in this case because some of the material facts found by the Circuit Court in this case, and which are conclusive upon this court now, were disputed and denied by this court in the equity case. In *Firemen's Fund Insurance Co.* v. *Norwood*, 16 C. C. A. 136, the question under discussion was decided by this court after full

argument and consideration. The opinion in that case is exactly opposed to the opinion of the majority in this case, and yet the majority opinion nowhere refers to the Norwood case. If the court intends to overrule the Norwood case, it should have the courage and candor to say so. It is extremely unfair to the profession and the public, for an appellate court to put forth two opinions diametrically opposed to each other without noticing the fact and advising the profession which opinion they are to regard as the law of the court. The Norwood case was cited and its doctrine approved by the Circuit Court of Appeals for the Ninth Circuit in *McElroy* v. *British America Assur. Co. supra*, and also in the Sixth Circuit in the case of *London and L. Ins. Co.* v. *Fisher*, 34 C. C. A. 503.

There is another ground upon which the case should be reversed and the plaintiff in error awarded a new trial. The defendant in error is a New York corporation. A statute of that state in force at the time these policies were issued declares:

"No Forfeiture of Policy Without Notice. No life corporation doing business in this state shall declare forfeited or lapsed any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of non-payment, when due, of any premium, interest, or installment or any portion thereof, required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment, or portion due thereof on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen, and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation, or to a duly-appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy, and all payments thereon, will become forfeited and void, except as to the right to a surrender value, or paid-up policy, as in this chapter provided. If the payment demanded by such notice shall be made within the time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly

addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given." Laws 1892, c. 690, art. 1, par. 92.

In *Baxter* v. *Insurance Co.* 119 N. Y. 454, the Court of Appeals of that state speaking of this statute and its effect upon the policy of life insurance issued under it said: "This statute was part of the contract in question and governed the rights and liabilities of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy." In that case the defendant was claiming a forfeiture of a policy for non-payment of the premium when due. It was not shown by the insurance company that the notice required by this statute had been given. The court continues as follows: "There was no proof given at the trial by either party to show whether this notice had been served or not. It is obvious that this statute when imported into the contract modified its conditions in very material respects. The duration and validity of the policy are not then dependant upon the payment of the premium on the day named therein, but upon the payment within thirty days after the notice has been given. * * * The statute prescribes this notice as a necessary condition of forfeiture, and, unless it was served the assured was not in default because payment within thirty days after notice is to be taken as a full compliance with the conditions as to payment of the premiums. * * * Before defendant could raise any question in regard to the non-payment of the August premium, it was necessary to show that it had complied with the statute by serving a notice, as this step was essential in order to put the insured in default, or to raise any point based on his omission to pay the last quarterly premium." See also, *DeFrece* v. *Insurance Co.* 136 N. Y. 151; *Phelan* v. *Insurance Co.* 113 N. Y. 147.

In *Griffith* v. *Insurance Co.* 101 Cal. 627, *Johnson* v. *N. Y. Life Insurance Co.* 78 N. W. Rep. (Iowa) 905, *New York Life Insurance Co.* v. *Dingley*, 93 Fed. Rep. (U. S. Circuit Court of Appeals, 9th Circuit) 153, *Rosenplanter* v. *Provident Sav. Life Assur. Soc.* 96 Fed. Rep. 721 (U. S. Circuit Court of Appeals, 6th Circuit), the same statute is considered and the interpretation given it by the New York courts adopted.

The burden of proof to show that this notice was given rests upon the insurance company. It must show a strict compliance with the terms of the statute before it can assert a forfeiture. This is conceded by the defendant in error, and in its answer claiming a forfeiture of the policies, it is alleged that notice was duly mailed to the insured at least fifteen days and not more than forty-five days before the premiums were due on the policies, in the form required by the statute. But there is no finding of fact to support

this allegation. The only finding of fact on the subject reads as follows:

"10th. That not later than November 17, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the State of New York."

101

It will be observed that there is a total failure to find the facts show a compliance with the statute by the company. One requirement of the statute is that the notice shall be sent "at least fifteen and not more than forty-five days prior to the day when the same is payable." The only finding on the subject is, "that n t later than Novem' er 17, 1894, notice was sent." But how much earlier than November 17, 1894, was it sent? It might have been sent the first of July, and this finding would be true. It is not upon such a finding that a court can declare a forfeiture. The rule is absolute and without an exception that the special findings of fact of the lower court must distinctly and specifically find every fact essential to support its judgment. Nothing can be supplied by intendment.

The next clause of this finding, namely, that the "notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company in accordance with the requirements of the statute of the State of New York" is fatally defective for the reason that it states a mere conclusion of law, and finds no fact whatever. The contents of the notice are not given, and the notice is nowhere set out. It was the duty of the lower court either to make the notice a part of its finding or set out its contents specifically so that this court could determine whether it was "in accordance with the requirements of the statute of the State of New York." Under the New York statutes the forfeiture of a policy for the non-payment of premiums does not depend, as we have seen, upon the non-payment of the premiums according to the terms of the policy, but upon their non-payment after the notice prescribed by the statute has been given. What that notice must contain to make it effectual will be seen by reference to the statute copied above, and its requirements need not be repeated here. See cases *supra*. The inadequacy of the finding on this point is forcibly illustrated by the facts disclosed in the record in the equity suit now a part of the records of this court. A reference to that record discloses the fact that the notice which was given was fatally defective in at least two particulars. *Rosenplanter* v. *Provident Sav. Life Assur. Soc. of N. Y.* 96 Fed. Rep., 721; *New York Life Ins. Co.* v. *Dingley*, 93 Fed. Rep. 153. It is to be regretted that the majority of the court have

deemed silence the best method of disposing of the question of the sufficiency of this finding.

The judgment of the Circuit Court should be reversed, and the case remanded with instructions to grant a new trial.

Filed December 11, 1899.

A true copy.

Attest:

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

 Judgment.

And on the eleventh day of December, A. D. 1899, in the record of the proceedings of said United States Circuit Court of Appeals is a judgment in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.
December Term, 1899. Monday, December 11, 1899.

Fred A. McMaster, Administrator of the estate of F. E. McMaster, deceased, Plaintiff in Error,
No. 1202. vs.
The New York Life Insurance Company.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Iowa, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that the New York Life Insurance Company have and recover against Fred A. McMaster, Administrator of the estate of F. E. McMaster, deceased, the sum of twenty dollars for its costs herein.

December 11, 1899.

Petition for Rehearing.

And on the twentieth day of January, A. D. 1900, a petition by Plaintiff in Error for a rehearing of said cause was filed, in the following words, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

EIGHTH CIRCUIT.

NO. 1202.

DECEMBER TERM, A. D. 1899.

FRED. A. McMASTER, ADMINISTRATOR,

Plaintiff in Error,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

PETITION FOR REHEARING.

Your petitioner, Fred A. McMaster, administrator of the estate of F. E. McMaster, deceased, plaintiff in error, believing and representing himself to be aggrieved by the decree of this Honorable Court in the above entitled cause, respectfully asks a rehearing and reargument thereof, to the end that the said decree may be reversed, and for grounds thereof would respectfully state:

I.

Your petitioner would ask a rehearing upon the entire cause, and upon all the questions presented whether considered in the separate opinions of the Court or not.

II.

The Plaintiff in Error is Entitled to Invoke the Doctrine of Equitable Estoppel Against the Insurance Company.

Judge Thayer in his concurring opinion says:

"If one party to an agreement resorts to any fraud, trickery or artifice to prevent the opposite party from reading it before signing or accepting it, or *knowingly* makes *any* false representations concerning the terms of the agreement, or intentionally and with design to overreach the opposite party, so drafts a contract that it does not express the terms of the previous oral understanding or agreement—in all of these cases the negligence of one who signs or accepts a contract without reading it is more excusable than the fraud of the opposite contracting party."

From this we will extract one sentence:

"If one party to an agreement * * * knowingly makes any false representations concerning the terms of the agreement * * * the negligence of the one who signs or accepts a contract without reading it is more excusable than the fraud of the opposite contracting party."

The assured is dead. The only available evidence is that of the hostile agent of the insurance company. It is hardly to be supposed that such agent would proclaim from the witness stand his "false representations concerning the terms of the agreement" in as plain English as would an impartial witness. Neither "the fraud of the opposite contracting party" nor the assumed "negligence" of the assured should be permitted to escape the attention of the Court. It is not out of place, although of course not in itself authoritative, to quote a part of the

evidence of the hostile and unwilling witness, the agent of the insurance company.

"Q. In what form did you have them (the policies) when you delivered them to him as to being in envelopes or tied together?

"A. There were five separate policies and they were in five separate envelopes, and the five were placed in one large envelope and delivered to me at the office of the company, and I delivered them to McMaster in that form.

"Q. Did he take them from you?

"A. Yes, sir; he did.

"Q. State just what he did.

"A. He took them out of the (large) envelope and spread them out in his hands and started to take one out of the envelope, and some one come in and interrupted, and he said: 'Smith, are these policies as you represented and agreed they would be?'

"Q. You may state both what he did and what he said.

"A. He took them in his hands, as I stated before, and started to take one of the policies from the envelope and some one came in and interrupted us, and he laid them down on the desk, and he said: 'Smith, are these policies the same as you represented?' and I said, 'Yes, sir; they are.' And he said, 'Do they insure me for thirteen months?' and I said, 'Yes, sir; they do.' He said, '*You have read them over and found that they are the same as you have represented them to me?*' and I said, 'Yes;' and he said, 'Very well; I will pay you for them;' and he did at that time, and placed the policies in a pigeon hole of the desk" (unread).

From such evidence the Court made its 9th finding, as follows:

"The five policies, enclosed in envelopes, on or about December 26th, 1893, were taken by F. W. Smith, the agent of the defendant company, to the office of Frank E. McMaster, who asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him, and thereupon McMaster paid the

agent the full first annual premium, or the sum of twenty-one dollars on each policy, and without reading the policies he received them and placed them away. The agent did not in any way attempt to prevent McMaster from reading the policies, and he had the full opportunity for reading them, but in fact did not read them and accepted them on the statement of the agent of the company, as hereinbefore set forth."

The agent had read the policies. He knew that his "representations concerning the terms of the agreement" were false, and had been rendered so by his interpolating into the applications the words "please date policy same as application." It is admitted that this illegal interlineation wrought the grief of this controversy. It is strange that against the express provision of the application that there was to be no insurance *until* the delivery of the policies, the company should have made the premium payable six days *before* the policies were dated or written. It must be unusual to so fix the premium day unless oral insurance is given. That illegal interlineation and the company's action thereon caused the loss in this case. The fault is wholly that of the company. Why should it profit thereby? He had so illegally changed the application to crowd the policies into the December, 1893, business, and thus earn for himself a bonus. It is true that the agent did not lay violent hands on the assured to prevent him from reading the policies. He accomplished their delivery and the payment of the premium in a more certain and seductive way. His controlling impulse was to get possession of the $105 in premiums and get away with it, and earn the bonus and his commission. He had reason to fear that the discovery by the assured of his deception might wholly defeat the transaction, and so he took advantage of the interruption to prevent the assured from reading and considering the

policies, got the cash, saw the policies pigeon-holed unread, and then went on his way rejoicing. While under the authorities we do not need to go so far, still we submit that the agent of the company at the critical moment designedly, intentionally and knowingly resorted to fraud, trickery and artifice to advance his own interest and to deceive the insured and prevent him from reading the policies.

Did the company through its agent, Smith, "knowingly make any false representations concerning the terms of the agreement?" This is Judge Thayer's crucial test.

Upon us seems to fall the task of demonstrating an axiom.

Smith was the agent who promised thirteen months' insurance backed up by the company's *printed circulars* (3d finding) and through instructions. He knew the contents of these particular policies. He assumed to state their terms as to the controlling question of thirteen months' insurance from actual perusal. He gave no advice or warning to the insured of a "counter proposition." He plainly and positively stated that there was no counter proposition. He positively stated to the insured to induce the payment of the premiums that the policies "were as represented," and that "they would insure McMaster for the period of thirteen months." He saw the policies pigeon holed away for safe keeping unread, and took $105 in premiums, knowing that the transaction was consummated and the premiums paid in reliance on his truthfulness and honesty. The result was accomplished by misleading, deceit and fraud. The agent's conduct is at variance with every element of good faith dealing and

fair play, and yet the Court falls helpless before it, and smites it not.

III.

It is Enough if the Conduct of the Agent Naturally Resulted in Accomplishing a Legal Fraud.

Judge Thayer says: "The findings to my mind do not create a suspicion of *intentional* deceit either on the part of the insurance company or its agent."

The finding is that when the insurance company presented the policies to the assured, in delivery, he asked the agent "if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him, and, thereupon, McMaster paid the agent the full first annual premium * * *, and without reading the policies he received them and placed them away. The agent did not in any way attempt to prevent McMaster from reading the policies, and he had the full opportunity of reading them, but in fact did not read them, and accepted them on the statement of the agent of the company as hereinbefore set forth."

The Court found the ultimate fact from the evidence already quoted in part. "The terms of the policies are clear and their meaning is certain" says Judge Sanborn. Well, then, it follows that the agent knowingly made a "false representation concerning the terms of the agreement," and the rule laid down by Judge Thayer is satisfied. All this is proven, in spite of the deprivation of the only other witness by death, out of the mouth of the unwilling, hostile, guilty agent.

All the members of the Court admit deceit, but Judge Thayer qualifies the term by the word "intentional." Do not the findings establish intentional deceit? Even if it should be conceded, which it is not, that it was permissible for the insurance company to deliver policies in silence and without comment, notice or advice, which by their terms presented a materially different and "counter proposition," still it cannot be the law that when such delivery was challenged by the persistent questioning of the assured and answered by the positive and authoritative representations as to the existing terms of the policies by the agent, who had read and knew the terms of the policies, and who saw the assured accept the policies unread, relying on his representations and statements—that under such circumstances the insurance company is not estopped to invoke the rule that the writings are the only and conclusive proofs of the actual agreement.

What man of ordinary prudence after these questions had thus been asked and answered by the agent of the company, who under the Iowa law spoke with binding authority, and who was familiar with the terms of these policies, and an expert on the terms . language of life insurance, the very person who had urged the inducing features of the policies—the "nice provision" of thirteen full months of insurance, reinforced by printed "circulars issued by the company," and emphasized by the form of the policy itself, as the Court finds—would have detained the agent for three hours to read all five policies? To have done so would have been to give the lie in the very teeth of the agent, the friend and neighbor of the assured. To require that that should have been done is to establish a rule that all men must act on the presumption that all other men are liars.

These were not representations *de futuro*, were not mere expressions of opinion, nor statements of conclusions of law; but they were statements concerning the terms of the policies as existing facts, avowedly known to the company, made to induce the acceptance of the policies, and of all of which the assured was admittedly ignorant.

Every assumption in the concurring opinion of Judge Thayer which controlled his action is, we submit, an assumption unwarranted in the case, and we appeal to this Court and to that distinguished jurist in particular, to review this case.

Thirteen full months of insurance was the dominant inducement, and any representations as to that matter either in the policies or out of them was material. It was dishonest and fraudulent to present the "counter proposition" without even advising the assured that the policies contained a "counter proposition" on the heralded "nice provision," and it was doubly so to stand up and in the face of the assured, in response to his exacting and searching inquiries, proclaim as strong as language is capable of putting it, that the policies contained no counter proposition, but by their terms furnished thirteen months of insurance for the first premium, and were in all respects as represented. The very dash and boldness of the enterprise only emphasized and made more certain of success the actual deceit and fraud practiced.

Justice rebels against this decision. No man can read it and not say that it *ought* to be the other way. It inflicts the death penalty for the alleged negligence of the assured, whose only fault was that he trusted and relied on the representations of the representative of the insur-

ance company, and dismisses with cold technicalities the unwhipped deceit and the legal fraud.

Between the lines of the ruling opinion itself there breathes a shock to the warm impulse of the writer and a wish that the conclusion might be otherwise, but that it cannot because of the alleged effect that must be given to a written contract in deference to an ancient rule. We submit that the evolution of equity practice and the rules of evidence have refined and distinguished away the rigor of the rule, before which the majority of this Court fell prostrate, to such a degree as to sanction a decision in this case that would permit law and conscience to go hand in hand. There is ample warrant and authority for the application of the doctrine of equitable estoppel.

This Court can apply an equitable estoppel in this case.

Barnard vs. *German American Seminary*, 49 Mich., 444.
Kirk vs. *Hamilton*, 102 U. S., 777.
John Shilleto Co. vs. *M'Clung*, 45 Fed., 778.

And see also cases cited in support of proposition V.

IV.

No Sufficient Effect Has Been Given to the 12th and 13th Findings.

For Judge Sanborn to say that the provisions of the policies are neither inconsistent nor ambiguous, but clear and certain and free from doubt, and for Judge Thayer to say of the agent who read the policies, who was the very agent who solicited the insurance and delivered the

policies and received the cash premium for his company and the bonus for himself; that "the company's agent doubtless believed that the policy did secure insurance for thirteen months counting from the premium day named in the policies (which was the one thing he agreed was not to be done), and that it was in all respects such a contract as he had engaged to deliver," makes all comment as needless as it would be difficult.

Judge Thayer says that the findings do not disclose that the assured objected to the construction placed upon the policies by Miss Ball as stated in the 11th finding. The findings, it is true, do not disclose that he parleyed or entered into a legal controversy with this lady collector. But the evidence of the company also resulted in the 12th and 13th findings, which present a conclusion and satisfactory objection to her construction, and show that the assured was relying on the policies being in force three days before his death, and subsequently to the time that the alleged forfeiture became complete, namely, by postponing the taking of other insurance because of the pendency of this particular insurance. No judge of this Court mentions these two findings, and, yet, they disclose that the assured on January 15, 1895, was risking the support of those dependent upon him on the strength of his belief and faith that the policies in suit secured him thirteen months of insurance, a fact that speaks louder than words against the random evidence of the insurance company's collector given three years after the alleged conversation took place, and which, even if truly given, would not abrogate the vested right of estoppel.

This case must be considered and decided on the rights acquired by the assured under the payment of the first year's premium, not on what acts were necessary to

be performed by him to keep the insurance in force in subsequent years. The question is, how much insurance did the assured buy with the first premium? Not when did the policies become lapsed as to subsequent years. Even if it should be conceded that the renewal right had lapsed as to subsequent years when the assured died, still there is no inconsistency in the claim that a recovery may be had on the policies under rights existing by virtue of the payment of the first premium. For the purpose of determining the rights of the parties growing out of the payment of the first premium, the policies may still be alive, although dead for every other purpose.

V.

The "Intent" is Not Always a Controlling Element in the Doctrine of Estoppel.

Judge Thayer speaks of an "intent to defraud" and "intentional deceit" as though either or both were necessary to sustain an equitable estoppel. But neither the intent to defraud or mislead, nor a fraudulent purpose is essential.

The following quotation, from *Leather Manufacturers National Bank* v. *Morgan*, 117 U. S., 96, establishes the proposition that neither a fraudulent purpose nor an intent to deceive or mislead is essential.

"In Continental Nat. Bank v. Nat. Bank of the Commonwealth, 50 N. Y., 583, it was held not to be always necessary to such an estoppel that there should be an intention, upon the part of the person making a declaration or doing an act, to mislead the one who is induced to rely upon it. 'Indeed,' said Folger, J., 'it would limit the rule much within the reason of it if it were re-

stricted to cases where there was an element of fraudulent purpose. In very many of the cases in which the rule has been applied, there was no more than negligence on the part of him who is estopped. And it has long been held that where it is a breach of good faith to allow the truth to be shown, there an admission will estop. Gaylor v. Van Loan, 15 Wend., 308.' The general doctrine, with proper limitations, was well expressed in Freeman v. Cooke, 2 Exch., 658, and in Carr v. London & N. W. R. Co., L. R., 10 C. P., 307. In the first of these cases it was said by Parke, B., for the whole Court, that '*If, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it and did act upon it as true*, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect."

"The law upon the subject is well settled. The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. The remedy is so applied as to promote the ends of justice. It is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit."

Dickerson vs. *Colgrove*, 100 U. S., 580.

The Ottumwa Bell, 78 Fed. Rep., 643.

"It is not necessary to equitable estoppel that the party should design to mislead."

Blair vs. *Waite*, 69 N. Y., 116, approved in 117 U. S., 109.

"It is well settled that there need not be any design to defraud in order to constitute an estoppel."

Pitcher vs. *Dove*, 99 Ind., 178.

"It will be seen that fraud is not given as an essential requisite in the foregoing statement. It is not absolutely necessary that the conduct mentioned in the first subdivision should be done with a fraudulent purpose or intent, or with an actual and fraudulent intention of deceiving the other party; nor is this meaning implied by any of the language which I have used. The adoption of such an element as always essential would at once strike out some of the most familiar and best established instances of equitable estoppel."

2 Pom. Eq. Jur., §805.

"An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped."

Thompson vs. *Simpson*, 28 N. E. R., 632 (N. Y).

In *Dair* vs. *U. S.*, 16 Wall., 1, 4, Justice Field, in a case where an estoppel was urged, said:

"It is, accordingly, established doctrine that, whenever an act is done or statement made by a party which cannot be contradicted without fraud on his part or injury to others whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what otherwise would be mere matter of evidence."

"Every person will be conclusively presumed to intend to be understood according to the reasonable import of his words, and when a person's words are thus reasonably understood and justly acted upon by another, such person cannot be heard to aver to the contrary as against the other."

Sessions vs. *Rice*, 70 Iowa, 309.

The law, therefore, proceeds upon the theory that the purpose and intent are to be evoked out of the natural result, and we submit that the findings of the Court are sufficient to sustain both a fraudulent purpose and an intention to deceive, and certainly, that they are sufficient

to answer the requisites of the *Morgan* case, *supra*. In short, they find that a *legal* fraud was perpetrated, and that is enough.

The finding that the agent did not attempt to prevent the assured from reading the policies, and that the assured had full opportunity for reading them, does not overcome the fact that the representations there and then made, in direct response to rigid inquiry, by one who must have known his representations to be false, certainly so if the contract was unambiguous, did in fact deceive and mislead the assured, who accepted the policies in reliance on such representations, as the Circuit Court found.

11 *Am. & Eng. Ency. of Law*, 2nd Ed., 431 *et seq.*, and cases.

The finding that the assured had full opportunity to read the policies does not militate against an estoppel. The agent did not tender policies responsive to the agreement, but, as Judge Sanborn says, "counter propositions." This fact the agent did not disclose, and he certainly knew that it would be deceiving the assured to take his money on a counter proposition without the assured even knowing that a counter proposition was involved. Silence would have constituted deceit and false representation, intolerable in honest business dealing; but when the insurance company spoke under rigid and searching inquiry, it was irrevocably subjected to the highest duty to speak the truth. It failed to disclose a counter proposition; it put McMaster off his guard by bold positive statements, that, coming from an expert in such matters, resulted, as in law it must be presumed, to have been intended it should result, in deceit and legal fraud.

THE ONE CONTROLLING INDUCEMENT UNDER WHICH THE INSURANCE WAS BOUGHT FROM THIS COM-

PANY WAS OMITTED FROM THE COUNTER-PROPOSITION. The agent reached for the money with which to fatten his bonus under the most positive representation of thirteen months' actual insurance under the terms of the policy, and left the policies in McMaster's possession, pigeon holed and unread.

Such dealing this Court seems to justify under no harsher name than a mere counter proposition. Surely this Court has decided some other case; for the admitted facts of this case seem to us to have been misapprehended. The full opportunity for reading the policies ceases to be controlling when the insurance company did not remain merely passive, but affirmatively acted and spoke to mislead and deceive.

This Court says that the company presented an alleged counter proposition. The Circuit Court found that the company said there was counter proposition in the policies. Judge Thayer says that if the agent knowingly made any false representations concerning the terms of the agreement, then the defendant would be estopped.

The policy is made up of the proposition (the application) and the "counter proposition" (the policy), and *both* are the contract (5, p. 12). This Court, in finding a proposition and a counter proposition all in *one* instrument, finds both inconsistency and ambiguity, and knows it not.

VI.

The 10th Finding as to Notice is Insufficient to Authorize or Support the Judgment.

This case was tried by the Circuit Court without the intervention of a jury, and the judgment was rendered

upon a special finding of facts. That being true, this Appellate Court will only consider "the sufficiency of the facts found to support the judgment," that is, whether the judgment rendered is right.

Randle v. *Barnard*, 81 F. R., 682.

It will be conceded that the insurance company had the burden of showing that a legal and sufficient notice was given to the assured warning him of the approaching maturity of the premiums and demanding their payment under penalty of a forfeiture of the policies.

The 10th finding is as follows:

"That not later than November 17th, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the state of New York."

The statement in this finding that the notice was given "in accordance with the requirements of the statutes of the state of New York" is not a finding of an ultimate fact, but a mere conclusion of law, and does not overcome the burden of proof imposed on the company.

U. S. v. *Harris*, 77 Fed., 825.
Cooper v. *French*, 52 Ia., 531.
12 Ency. Pl. & Pr., pp. 1038-1046.
Daube v. *Phil. Ry. Co.*, 77 F. R., 715-6.

The silence of a special finding as to an essential fact is equivalent to a finding against the party upon whom the burden rests of proving such fact.

U. S. v. *Harris*, 77 F. R., 821.

The New York statute (quoted in full in the dissenting opinion of Judge Caldwell), as to the form, matter

and requisites of the notice, is controlling and dominates the policies.

The finding is, we submit, subject to the following specific objections, which render it insufficient to support the judgment of the Circuit Court.

(1.) The finding does not show that the notice required to be given under the New York statutes of 1892, chapter 690, article 1, paragraph 92, was given. Under this statute the notice had to be given "at least fifteen *and not more than forty-five days* prior to the day when the same (premium) is payable."

The application declares this to be a New York contract (p. 12). The policies refer expressly to this statute (p. 10). The policies are made payable in New York City, and were there advised, issued and dated. Proofs of death were also to be made there.

The finding that notice was given "not later than November 17, 1894," is not the finding of an ultimate fact, and utterly fails to find a sufficient and legal notice.

Under this finding the notice may have been sent more than forty-five days prior to the day when the premium was payable, in which event it would be void.

(2.) The Circuit Court found that the notice was sent to Frank E. McMaster. The New York statute requires that the notice "shall be duly addressed and mailed to the person whose life is insured." For anything that appears the notice may have been sent to Alaska in open form by a clerk of the office or some private person on a bicycle or even afoot.

(3.) The finding does not state, as the New York statute requires, that the letter enclosing the notice was

mailed and properly addressed to the assured "at his or her last known postoffice address, postage paid" (meaning, prepaid).

(4.) The finding does not show, as the New York statute requires, (a) that a written or printed notice was given; (b) stating the amount of the premiums due on the policies; (c) the place where the premiums should be paid; (d) and the person to whom the premiums should be paid; (e) nor does it show whether the "notice sent" was duly addressed and mailed to the insured; (f) at his last known postoffice address; (g) postage prepaid by the insurance company, or by an officer or collector thereof; (h) not more than forty-five days prior to the day when the premiums were payable.

(5.) The finding does not show when the company notified the insured to pay the premiums, nor when the company claimed the premiums became due and payable.

(6.) The finding does not show whether the notice sent stated that unless the premiums then due were paid to the company before the day when they became due the policies would become forfeited and void.

The New York statute is strict and exacting in reference to the contents of the notice. All of the facts covered by the foregoing objections are essential to a legal and sufficient notice. But there is absolutely nothing in the finding to indicate that the notice contained any of the matters required, with the possible exception of notice of the coming due of the premiums, at some unstated time. Such a notice would be wholly insufficient because not containing a statement of the matters required to be

shown by the statute and the following cases of consruction:

Baxter vs. *Brooklyn Life Ins. Co.*, 119 N. Y., 450.
Defrece vs. *Ins. Co.*, 136 N. Y., 151.
Phelan vs. *Ins. Co.*, 113 N. Y., 147.

The "Due Date" is Ambiguous, Indefinite and Elastic and the Allowance of Thirteen Months' Insurance Does Not Vary the Terms of the Policies.

VII.

Article 1, paragraph 92, chapter 690, of the laws of 1892, of the state of New York, is set out in full in the dissenting opinion of Judge Caldwell, and need not be repeated.

The opinion in *Baxter* v. *Brooklyn Life Insurance Co.*, 119 N. Y., 454, seems to hold that the *due* date is not fixed save by the expiration of thirty days *after* giving the required notice. It holds that "the insured was not in default, because payment within thirty days after notice is to be taken as a full compliance with the conditions as to payment of premium." The dissenting opinion emphasizes the point in these words:

"The construction placed on the statute in the prevailing opinion that by its operation the premium *does not become due until after notice and expiration of the thirty days* * * * is, I think, untenable. The premium is due from the time it becomes due according to the terms of the policy, and remains due at all times thereafter until actually paid."

The majority holding is, therefore, that the premium *does not become due* until after notice and expiration of the thirty days.

The provisions as to payment of premiums and grace (rec., pp. 8 and 9) say: "If any premium is not thus paid on or before the day *when due*, then (except as hereinafter or otherwise provided) this policy shall become void and all payments previously made shall remain the property of the company."

This provision does not refer specifically nor necessarily to the words "twelfth of December" in the face of the policies (rec., p. 6), but to the *due date* as fixed by the New York statute and the previous construction of the highest Court of that state.

The due date of the premium under the Baxter case is fixed by the New York statute, which is a part of the contract, and may postpone the due date beyond December 12. Should not a construction be given to these two paragraphs (payment of premiums and grace, rec., pp. 8 and 9), consistent with the controlling New York statute?

That statute, under the *Baxter* case, makes the due date ascertainable, not from the language of the policies, but by the expiration of thirty days after the giving of the statutory notice. Is there not sufficient force in this contention, reinforced as it is by the language of the *Baxter* case, to justify and support a finding that the due date is an unfixed and elastic date, and, that, therefore, the thirteen months' insurance could readily be given by the company as agreed without violating any of the terms of the written contract, which must include the provisions of the statute, by merely adjusting the date of the giving of the notice to the representations made by it in its printed circulars and by its agent under intsructions?

It must be presumed that the company in putting out the language of the policies, under the head "pay-

ments of premiums" (rec., p. 8), knew of the *Baxter* and subsequent cases. If the company could easily have given a notice in harmony with its representations and the policies, then it should now be estopped to give one that abrogates the promises on which it induced the business.

VIII.

In our former brief we endeavored to show on authority that the New York statute became a commanding part of the policies. The words, "If any premium is not thus paid *on or before the day when due*, then this policy shall become void," is without meaning, unless read in connection with the statute. It was not possible for the parties to agree, and to make the agreement effective, that the policies should become void if the second premium was not paid on the 12th day of December. The statute of New York could not thus be annulled and set aside by agreement of the parties.

In order, therefore, to give this provision sense and a meaning consistent with the law, the words "when due" should refer to that unfixed and elastic maturity of thirty days after the expiration of the giving of the statutory notice, for only at such a time and under the fulfillment of such conditions was it possible for the parties to agree *effectively* that "then this policy shall become void." These words should be construed in the light of the company's knowledge of the provisions of the New York statute, and of the New York decisions, and if one construction tends to establish an agreement that would be unlawful or beyond the ability of the parties to make, and another an agreement that is in harmony with the statute, and within the ability of the parties to make,

then the latter construction should prevail. If such a rule of consruction is adopted for this case, we submit that the words "when due" should mean thirty days after the expiration of the giving of the statutory notice, because only at such a date was it possible for the parties to agree that "this policy shall become void, and all payments previously made shall remain the property of the company."

No specific time was fixed for the giving of the notice. The *time* of giving the notice was left to the future determination of the company. A construction that makes an agreement mean sense and law is better than a construction that is at war with both. The policies do agree in binding effect that the notice shall not be so given as to fix the *due* date *before* December 12, but do not agree that the notice will not be so delayed as to fix the due date *after* December 12, and as the month of grace is intended as a gratuity it should be added to the thirty days after notice.

IX.

In the light of *New York Life Insurance Company* v. *Dingley*, 93 Fed. Rep., 153, and *Rosenplanter* v. *Provident Sav. & Life Assur. Society*, 96 Fed. Rep., 721, we ask the further attention of the Court to the provision at the foot of page 8 of the record. This provision is not printed on the face of the policies, but must be searched for among the debris of endorsements, and this is the provision, if any, that works havoc on the question of thirteen months' insurance. It is manifest that in these cases the best legal talent on insurance in the country could not devise a valid notice under the policies and the New York statute, and yet Judge Sanborn says that all the provisions are clear

and unambiguous. As a matter of mental test, we would ask the Court to endeavor to frame for itself a notice that would have satisfied the requisites of the entire situation.

Suppose the notice provided (in the language of page 8): "If the premium is not thus paid on or before the day when due (to-wit: December 12, 1894), then, except as hereinafter otherwise provided, this policy shall become void, and all payments previously made shall remain the property of the company." Evidently such a notice would be invalid, because it would have misled the assured, and because it would not be true in fact. This form presupposes that the words "when due" mean December 12th.

Let us try it again. Let the notice contain a provision that if the premium is not thus paid on or before the expiration of thirty days after the mailing of the notice, then, etc., this policy shall become void. This assumes that the words "when due" mean when the policies are ripe for forefeiture under the New York statute, because it assumes to fix a date when the parties might legally contract to give forfeiture effect under the terms "then this policy shall become void." This form is preferable to the first attempt, but still would be insufficient, because it would not of itself fix the date, and would require the insured to ascertain when the mailing had taken place, or if it fixed a date of mailing, the assured would still be entitled to the statutory provision, which would control even against a date fixed in the notice itself. More than this, the second attempt would be insufficient if mailed, say forty-five days prior to December 12th, because the statute was not intended to cut short but only to postpone the payable date.

A study of the statute as construed in both of the above cited cases shows the difficulty of framing a satis-

factory notice. Considering the face of the policy, the payment of premiums clause, and the New York statute together, we urge upon the Court that there is palpable inconsistency and ambiguity. It is proof enough of this difficulty of interpretation and conflict of provisions that the insurance company itself has issued millions of notices such as that set out on page 155 of 93 Federal Reporter, and has never issued a single valid notice. The notice in this case was just like the one in the *Dingley* case, and we contended that it was absolutely bad, but the Circuit Court was not convinced. It should be said, however, that the *Dingley* and *Rosenplanter* cases are subsequent to the decision of Judge Shiras.

Take the provision as to grace. Neither the first nor the second of the foregoing attempts at the making of a notice would be sufficient because this month of grace must be considered. The month of grace is supposed to be a gratuity, and should be beyond the statutory period.

If the finding of the Circuit Court means that the notice was mailed on some day on or between October 3d and November 17th, when would the month of grace begin, if ever? If the mailing was on October 3d, then difficulties arise. If on November 17th, then the law extends payment, and the month of grace must either be postponed or a part of it chopped off.

At any rate three possible dates assert themselves. The date December 12th, the date thirty days after the expiration of the mailing of the notice, and the date that would indicate the expiration of the month of grace, and the combination of these three matters seems to have successfully taxed the ingenuity of the insurance company; and yet, in the face of the fact that the insurance

company itself could not draft a notice after reading the policies in the light of the New York statute, this Court makes bold to say that for Tom, Dick and Harry the policies are clear, certain, unambiguous, not doubtful or difficult of construction, inconsistent or contradictory. We ask to be indulged in the suggestion that even this Court would experience difficulty in preparing a legal notice that would stand the fire of litigation under the provisions of the policies and the New York statute. The *Dingley* case shows that the defendant can't do it, and that fact alone ought to win this case by showing the difficulty of interpretation.

The New York statute says (93 Federal Reporter, 155) that the notice shall also state that "unless such premium * * * *then due* shall be paid * * * by or before the due day it *falls due*, the policy and all payments thereon shall become forfeited and void," except, etc. What do the words "then due" and the words "day it falls due" in the above quotation mean when read in connection with the thirty day provision, the grace provision, the payment of premiums clause, and the date on the face of the policy?

Taking the clause at the foot of page 8 again, and assuming that the notice in this case was mailed on the 17th of November, what would be done with the second paragraph of the "payment of premiums" clause? If the date, December 12th, is substituted for the words "the day when due," then that notice would be invalid, for the policy could not thus be rendered null and void, for the statute would enforce the thirty days. What then would become of the other grace provision? Would the grace given as a gratuity be absorbed by the statutory notice in whole or in part? Does the month of grace, at the top

of page 9 of the record, found on the back of the policy, overlap or add to the statutory grace?

Inasmuch as the *Dingley* case (93 F. R., 153) rests on New York cases older than this policy, we would ask whether the Court, after reading all these cases from the Baxter case to the Rosenplanter case (96 F. R., 721), will not be constrained to say, as the majority said in Fidelity & Casualty Company v. Lowenstein (97 F. R., 20), that there is created "a doubt as to its proper interpretation of sufficient gravity to be resolved in favor of the insured."

This provision of the policies and the statute seem to have been sufficiently ambiguous to tax the genius of Courts in majority and dissenting opinions, and to have overtaxed the ingenuity of the eminent counsel of the insurance company itself, for that company has not yet been able under these assailed provisions to shape a notice that the Courts have found sufficient. Under such a state of affairs, in the light of the New York statute and the decisions we confidently urge our contention that the terms of the policies on the crucial questions are uncertain, difficult of interpretation, inconsistent, doubtful and ambiguous. If the Court should hesitate to adopt all of this, it can and should go at least as far as Judge Thayer did in the *Lowenstein* case, and say that the question of ambiguity "is of sufficient gravity to be resolved in favor of the insured."

HENRY J. TAYLOR,

FRANK E. GILL,

Solicitors and of Counsel for Plaintiff in Error.

CERTIFICATE OF COUNSEL.

I, Henry J. Taylor, counsel for the plaintiff in error and petitioner for rehearing in the above entitled cause, do hereby certify that the above and foregoing petition for rehearing is made in good faith, and in the earnest belief that the petition should be granted. And I further certify that I have carefully examined the matters set forth in said petition for rehearing and reargument, and I believe the claims and grounds for said rehearing, as therein stated, are true and well founded and sufficient in point of law; and I further certify that said petition is not made for the purpose of vexation or delay.

Sioux City, Iowa, January 17th, 1900.

HENRY J. TAYLOR,
Counsel for Plaintiff in Error and Petitioner.

Order Denying Petition for Rehearing.

And on the twenty-second day of January, A. D. 1900, in the record of the proceedings of said United States circuit court of appeals, is an order denying the petition for a rehearing in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

FRED A. MCMASTER, Administrator of the Estate of F. E. McMaster, Deceased, Plaintiff in Error,
vs.
THE NEW YORK LIFE INSURANCE COMPANY. } No. 1202.

In error to the circuit court of the United States for the northern district of Iowa.

MONDAY, *January* 22, 1900.

This cause came on this day to be heard upon the petition for a rehearing filed by counsel for the plaintiff in error.

On consideration whereof it is now here ordered by this court that said petition for a rehearing of this cause be, and the same is hereby, denied.

January 22, 1900.

Certificate.

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing pages, numbered from one to one hundred and thirty-one, inclusive, contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinions of said United States circuit court of appeals, in a certain cause wherein Fred A. McMaster, as administrator of the estate of F. E. McMaster, deceased, was plaintiff in error and The New York Life Insurance Company was defendant in error, No. 1202, December term, A. D. 1899, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I do further certify that I have attached hereto and return herewith the original writ of certiorari, with my return thereto.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Louis, Missouri, in the eighth circuit, this second day of April, A. D. 1900.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Being informed that there is now pending before you a suit in which Fred A. McMaster, administrator of the estate of F. E. McMaster, deceased, is plaintiff in error and The New York Life Insurance Company is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the northern district of Iowa, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of March, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. No. 523, October term, 1899. Fred A. McMaster, adm'r, &c., *vs.* The New York Life Insurance Co. Writ of certiorari. Filed Apr. 2, 1900. John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA, }
Eighth Circuit. }

In obedience to the command of the within writ of certiorari, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In testimony whereof I hereto subscribe my name and affix the seal of the United States circuit court of appeals for the eighth circuit, at office, in the city of St. Louis, Missouri, this second day of April, A. D. 1900.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No., 17,637. Supreme Court U. S., October term, 1899. Term No., 199. Fred A. McMaster, adm'r, &c., petitioner, *vs.* The New York Life Insurance Company. Writ of certiorari and return. Filed April 4, 1900.

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JAMES H. McKENNEY,
Clerk

PETITION FOR CERTIORARI.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

PETITION FOR THE WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

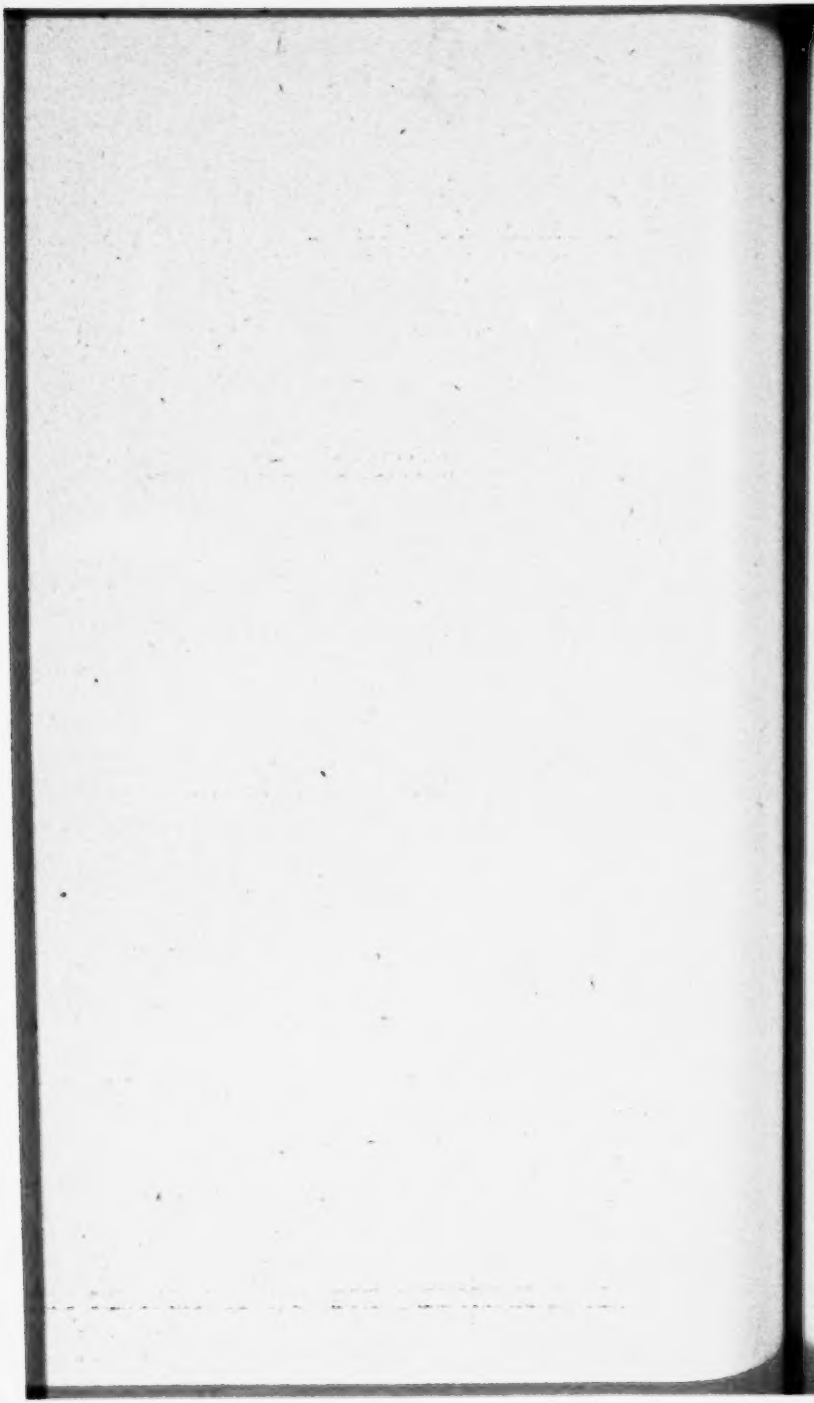
FRED A. McMASTER, ADMINISTRATOR,
Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY,
Respondent.

HENRY J. TAYLOR, SIOUX CITY, IOWA,
FRANK E. GILL, SIOUX CITY, IOWA,
ERIC A. BURGESS, SIOUX CITY, IOWA,
Solicitors and of Counsel for Petitioner.

F. ELKINS BROS. CO., SIOUX CITY.



In the Supreme Court of the United States.

OCTOBER TERM, 1899.

PETITION FOR THE WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

FRED A. McMASTER, ADMINISTRATOR,

Petitioner,

vs.

NEW YORK LIFE INSURANCE CO.,

Respondent.

PETITION FOR THE WRIT OF CERTIORARI TO REQUIRE THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES FOR ITS REVIEW AND DETERMINATION THE CASE OF FRED A. McMASTER, ADMINISTRATOR, PLAINTIFF IN ERROR, VS. NEW YORK LIFE INSURANCE COMPANY, DEFENDANT IN ERROR.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The Petitioner respectfully shows to this Honorable Court as follows:

I.

STATEMENT OF THE CASE.

This is an action by the petitioner, Fred A. McMaster, as administrator of the estate of Frank E. McMaster,

deceased, against the respondent, New York Life Insurance Company, upon five policies of insurance, dated December 18, 1893, for $1000 each on the life of the deceased. The assured died January 18, 1895. The policies had been taken under the one emphatic inducement that they would grant thirteen months' insurance for the first annual premium.

After the application had been signed by the assured and delivered to the agent, the agent, without the knowledge or consent of the assured, wrote on the face of the application the words: "Please date policy same as application." It was this secret forgery of the agent to further his own private interests that has caused all the trouble.

The company did not follow the secret direction of the agent, but dated the policies December 18th, and made the second annual premium payable December 12th, the date of the application. By oral agreement and by express provision of the application, which became a part of the policies, the policies were not to go into force or effect until after delivery and the payment of the first premium.

When the policies were delivered by the agent, the assured asked whether they were as had been represented, and whether they insured him for thirteen months for the first annual premium, as had been agreed, to both of which questions the agent gave an affirmative answer, and, thereupon, the assured paid the agent the full first annual premium, to-wit: $105 in cash.

The company resists a recovery on the policies upon the ground that they had lapsed prior to the death of the assured, because of his failure to pay the second annual

premium alleged to be payable under the terms of the policies on December 12, 1894.

The policies of the company grant a full month of grace (p. 9). Its answer herein admits that "This defendant grants to the insured in said defendant company a grace of one month on the payment of premiums" (p. 20). This full month of grace is a conceded fact.

Inasmuch as this is a law action, tried to the Circuit Court without the intervention of a jury, and one in which the trial Court made special findings of fact as the sole basis for the judgment in respect to which error is assigned, the said findings, being brief, will best serve here as the statement of facts. The findings are as follows:

"By written stipulation duly signed and filed, the parties to this action waived a jury trial, and consented to try the case before the Court, and the evidence having been fully submitted the Court finds the facts established by the evidence to be as follows:

1st. The plaintiff, Fred A. McMaster, was, when the suit was brought and is now, the lawfully appointed administrator of the estate of Frank E. McMaster, deceased, having been appointed administrator of the named estate by the Probate Court of Woodbury County, Iowa, and furthermore said plaintiff was, when this suit was brought and is now a citizen of the State of Iowa, and a resident of Woodbury County, Iowa.

2nd. That the defendant, the New York Life Insurance Company, was, when this suit was brought and is now, a corporation created under the laws of the state of New York, having its principal office and place of business in the city of New York in the state of New York, but being also engaged in carrying on its business of life insurance in the state of Iowa, and other states.

3rd. That in December, 1893, F. W. Smith, an agent for the New York Life Insurance Company, residing at

Sioux City, Iowa, solicited Frank E. McMaster to insure his life in that company, and as an inducement to taking the insurance, pressed upon McMaster the provision adopted by the company and set forth in the circulars issued by the company, and printed on the back of the policies issued by the company under the heading, "Benefits and provisions referred to in this policy," in the following words: "After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent. per annum for the number of days during which the premium remains due and unpaid, during said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance."

4th. Relying on the benefits of this provision, and in the belief that if he accepted a policy of insurance upon his life from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed, since the last payment of the annual premium, the said Frank E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on and attached to the petition, the same being made part of this finding of facts.

5th. In the application when signed by Frank E. McMaster, it was provided that the amount of insurance applied for was the sum of $5,000, to be evidenced by five policies for $1,000 each, on the ordinary life table, the premium to be payable annually.

6th. There now appears on the face of the application, interlined in ink, the words, "please date policy same as application." These words were not in the application when it was signed by McMaster, but after the signing thereof, they were written into the application by F. W. Smith, the agent of the New York Life Insurance Company, without the knowledge or assent of Frank E. McMaster, and were so written in by the agent in order to

secure to the agent a bonus which the company allowed to agents for business secured during the month of December, 1893, and it does not appear that Frank E. McMaster ever knew that these words had been written into the application, and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company and was acted on by the company.

7th. By the express understanding had between F. W. Smith, the agent of the New York Life Insurance Company, and Frank E. McMaster, when the application for insurance was signed, it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies and that the contract of insurance was not to take effect until the policies were delivered.

8th. The defendant company, at its home office in New York City, upon receipt of the application, determined to grant the insurance applied for, and issued five policies each for the sum of $1,000, dated December 18th, 1893, and reciting on the face thereof that the annual premium on each policy was $21, and forwarded the same to its agent, F. W. Smith, at Sioux City, Iowa, for delivery to Frank E. McMaster. These five policies are in the form of the one attached to the petition in this case, which is hereby made a part of this finding of fact, and each policy contains the recital: "This contract is made in consideration of the written application for this policy, and of the agreements, statements, and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and .... cents to be paid in advance, and of the payment of a like sum on the 12th day of December in every year thereafter during the continuance of this policy."

9th. The five policies enclosed in envelopes, on or about December 26th, 1893, were taken by F. W. Smith, the agent of the defendant company, to the office of Frank E. McMaster, who asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they

did so insure him, and thereupon McMaster paid the agent the full first annual premium, or the sum of $21, on each policy, and without reading the policies he received them and placed them away.

The agent did not in any way attempt to prevent McMaster from reading the policies, and he had the full opportunity for reading them, but in fact did not read them and accepted them on the statement of the agent of the company, as hereinabove set forth.

10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the state of New York.

11th. The renewal receipts for the second annual premium on the five policies held by Frank E. McMaster, in the defendant company, were sent for collection to Mary A. Ball, at Sioux City, Iowa, who on the 11th or 12th day of December, 1894, called on said McMaster for payment of the premiums in question. At that time McMaster declined making payment thereon, saying that he had seen other policies which promised better results, and that he did not think he would renew the insurance in the defendant company. Miss Ball told him the New York contracts had some nice provisions like thirty days of grace and loans, and in reply to an inquiry from McMaster, stated that his policies entitled him to the month's grace in the payment of the premiums, and that, as he understood it, the grace on the second premium would expire January 11th, and McMaster said if he concluded to keep any of the insurance he would call and pay for it before the grace expired.

12th. That in November or December, 1894, Frank E. McMaster was examined for the purpose of obtaining life insurance by the agents of the Union Central Insurance Company, it being understood between the parties that the policies were not to issue until in January, 1895, and it being the purpose of McMaster to take one or two thousand dollars' insurance in the Union Central Company,

at the expiration of his insurance in the defendant company, but also to continue part of the policies held in the defendant company.

13th. That on or about January 15th, 1895, the agent of the Union Central Company meeting McMaster on the street in Sioux City, told him the policies issued by the Union Central Company had been received, and in reply McMaster said, "All right; just hold them; there is no hurry about them," and in the same conversation he stated that he had other insurance, referring to the policies in the defendant company.

14th. That the action of Frank E. McMaster shows and the Court so finds the fact to be, that the said McMaster believed that the policies issued to him by the defendant company would continue in force for the period of thirteen months from the date of the policies, and his action with respect to the policies in the defendant company and the proposed insurance in the Union Central Company, was based upon and governed by this belief on his part.

15th. That Frank E. McMaster died at Sioux City on the morning of January 18th, 1895.

16th. That up to the time of his death, the said Frank E. McMaster had not paid the second year's premiums on the policies issued to him by the defendant company, nor have the same been paid since his death, nor had the said McMaster received or paid for the policies issued by the Union Central Company, and the same had not been delivered or become effectual.

17th. That due and sufficient notices and proofs of the death of said Frank E. McMaster were immediately sent to and received by the defendant company, and due demand for the payment of the five policies sued on was made by the plaintiff, as administrator of the estate of Frank E. McMaster, and refused by the defendant company, on the ground that the policies in question had lapsed and were not in force at the time of the death of said Frank E. McMaster, by reason of the failure to pay the second year's premium coming due on said policies.

18th. That the defendant company has not paid said policies or any part thereof, and assuming the same to be valid, there is due thereon, November 1, 1898, the sum of ($5,965.00) five thousand nine hundred and sixty-five dollars, after deducting from the face of the policies the amount of the second premiums with interest thereon to March 14, 1895."

The form of the policy, annexed by copy to the petition, is made a part of the foregoing findings, and is set out in full on pages 6 to 14, inclusive, of the Record.

II.

THUS FAR TWO JUDGES HAVE FILED SEPARATE OPINIONS FAVORING AND TWO JUDGES SEPARATE OPINIONS AGAINST A RECOVERY.

There are as many opinions in this case as there are judges who have heard it. Judges Shiras and Caldwell hold that the petitioner should recover; Judges Sanborn and Thayer hold that he should not.

The opinion of the trial Court, Judge Shiras, is found in the Record (pp. 35-52) and favors a recovery.

The opinion of Judge Sanborn, which denies a recovery, is found on pages 71-83 of the Record.

The opinion of Judge Thayer, which also denies a recovery, is found on pages 83-4 of the Record.

The dissenting opinion of Judge Caldwell, which sustains a recovery on the policies, is found on pages 84-101 of the Record.

Each of these distinguished jurists has filed a separate opinion that bears evidence of careful study, exhaus-

tive research and an appreciation of the gravity and importance of the case far beyond anything that was personal to this petitioner. In a more comprehensive way this consideration is due to the far reaching consequences of the decision, and as representing the final step in a legal controversy that originated as far back as the case of *Plumb* v. *Insurance Company*, 18 N. Y., 392, and which was again vigorously renewed in the recent case of *Insurance Company* v. *Norwood*, 69 Fed. Rep., 71. The decision in this case, in the opinion of Judge Caldwell (p. 99), amounts to a reversal of the *Norwood* case.

The petitioner asked a rehearing of this case in the Circuit Court of Appeals (p. 103), but his petition was denied January 22, 1900 (p. 131).

This Court will, of course, read all these opinions, and, therefore, the necessity for extended presentation is avoided.

While Judge Thayer concurs with Judge Sanborn, he is not willing to adopt Judge Sanborn's opinion, but only the result thereof. Indeed, each of the four judges rests his individual opinion upon various and different grounds, although Judges Shiras and Caldwell substantially agree. A brief quotation from the dissenting opinion of Judge Caldwell will indicate the gravity and importance of the case, as well as the deep seated conviction that the judgment on which we now ask this Court to grant the writ of certiorari, is radically wrong. In his dissenting opinion Judge Caldwell says:

"THE RIGHT DECISION OF THIS CASE DOES NOT DEPEND UPON ANY TECHNICALITIES OF LAW. IT IS A CASE IN WHICH COMMON SENSE AND COMMON HONESTY AND LEGAL SENSE AND LEGAL HONESTY ARE AT ONE." (P. 84).

Referring to the decision of the majority, Judge Caldwell further says:

"The rule of the Court obliterates all distinction between truth and falsehood in the dealings of men. It establishes the doctrine that the law has no partiality for truth and no prejudice against falsehood. It applauds and approves an end obtained by falsehood and fraud as a high exhibition of business tact and skill, and reserves its censures for the innocent and trusting victim of the fraud, because, forsooth, he accepted as true the word of the man he was dealing with; and it permits the party who made the false representation to avail himself of his own falshood to the prejudice of the man who trusted him. It makes confidence and bunco games respectable and elevates the sharper who practices them to a plane of equality with honest and reputable business men. It is a rule at which all rascaldom will rejoice, and all honest and trustful men take alarm. It stimulates falsehood and deceit by the grant of impunity, and destroys confidence among men. It converts written contracts which were designed to prevent fraud into the most powerful agencies for the perpetration and protection of fraud. * * Not one case cited by the majority is an authority *on the facts of this case*" (p. 99).

Judge Shiras (Record, p. 52) invited an appeal from his judgment in these words:

"If free to give judgment according to my own view of the questions involved, I should find for the plaintiff; but, as already stated, the Circuit Court of Appeals held in the equity case (87 Fed. Rep., 63) that there could be no recovery on the policies at law or in equity, and I deem it my duty to follow this ruling, leaving it to the plaintiff to carry this action at law before the Court for its further consideration, and, therefore, while my opinion is with the plaintiff, the judgment must be for the defendant.'

III.

THE SPECIAL FINDINGS OF THE CIRCUIT COURT AS TO NOTICE ARE INSUFFICIENT TO AUTHORIZE THE JUDGMENT OR TO SUSTAIN THE SAME ON APPEAL.

The application declares this insurance contract to be a New York contract (p. 12). The policies refer expressly to the New York statute of notice as Chapter 690, Laws of 1892, State of New York (p. 10), and they are made payable in case of loss in New York state (p. 6), and were there advised, issued and dated, and there proofs of death were to be made (pp. 6-9). The application is made a part of the policies (p. 12), and that expressly says that the policy and application "shall be construed according to the laws of the state of New York, the place of said contract being agreed to be the home office of said company in the city of New York" (p. 12).

The New York statute for many years has contained very stringent provisions requiring elaborate and explicit notice before forfeiture is permitted. This statute became a part of the contract and is set out in the brief filed in support of this petition, and also in the dissenting opinion of Judge Caldwell, page 99 of the Record.

The 10th finding as to notice, *supra* (p. 6), does not meet the statutory requirements that the notice shall be sent "at least fifteen and not more than forty-five days prior to the day when the same (premium) is payable," for the finding might be true and the notice have been sent sixty or ninety or one hundred days before the same was payable. The last clause of the finding is of no force,

in that the same is the statement of a mere legal conclusion. A copy of the notice sent is not contained in the findings, nor in any manner made a part thereof, nor is the substance of the notice upon any essential point stated or found.

Each of the several recited requirements of the New York statute, as construed by the highest Court of that state and approved by the Federal Courts, must be followed with unusual clearness and detail in order to constitute a notice sufficient to work a forfeiture. The finding of the Circuit Court is insufficient upon every one of the essential requisites. As Judge Caldwell says:

"It will be observed that there is a total failure to find the facts showing a compliance with the statute by the company. * * * It is not upon such a finding that a Court can declare a forfeiture. The rule is absolute and without an exception that the special finding of fact of the lower Court must distinctly and specifically find every fact essential to support its judgment. Nothing can be supplied by intendment. The next clause of this finding, namely, that the notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company in accordance with the requirements of the statute of the state of New York is fatally defective for the reason that it states a mere conclusion of law, and finds no fact whatever."

IV.

IN THE CIRCUIT COURT OF APPEALS, THE CASE TURNED ON THE PAROL-EVIDENCE RULE. IT SHOULD HAVE TURNED ON THE DOCTRINE OF ESTOPPEL IN PAIS.

This Court has said, *Insurance Company* v. *Hearne*, 20 Wall., 490, that the assured "had a right to assume that

the policy would accurately conform to the agreements thus made, and to rest confidently in that belief."

Judge Sanborn admits that the policies are not responsive to the agreements for insurance, but constitute what he calls "a counter proposition" upon the one controlling inducement that secured the business to the company, to-wit: thirteen months of insurance for the first full annual premium.

It is concluded by the special findings, based on admitted evidence, that the assured was to have a policy the terms of which would grant him thirteen full months of insurance for the first annual premium. Judge Sanborn's alleged "counter proposition" is construed to have reduced this time to twelve months and seventeen days, depriving the insured of nearly half of the extra month of grace feature, which was so successfully heralded by the agent and "by circulars issued by the company" (3d finding, p. 32), and by provisions printed on the back of the policy itself. This "counter proposition" was delivered to the assured without advising or warning him that the policies involved a counter proposition.

More than this, in response to the searching, exacting and comprehensive inquiries of the assured put to the agent at the moment of the delivery of the policies and the payment of premiums, the company represented that the terms of the policies were as represented, and that they did insure him for the full period of thirteen months, and the assured, relying upon these representations as to existing facts in the terms of the completed policies, accepted them, placed them away unread before the eyes of the agent, to whom he then paid "the full first annual premium."

It is urged that such conduct as is disclosed in the special findings estops the respondent company from asserting the provisions, if any, of the policies that would deprive the assured of thirteen months of insurance from the agreed time, and as stated in the application, to-wit: thirteen months' insurance from the delivery of the policies and payment of the premiums, December 26, 1893. The statements of the agent in reference to the existing terms of the policies were known to him to be false, but were relied upon by the assured to his possible damage. That the guilty party may not render his fraud effectual, the parol evidence rule must yield to the rule of equitable estoppel.

Insurance Co. v. *Wilkinson*, 13 Wall., 222.
Equitable Ins. Co. v. *Hearne* 20 ,Wall., 494.

V.

UPON THE LEGAL PROPOSITIONS UNDER WHICH THE MAJORITY OF THE CIRCUIT COURT OF APPEALS DENIED A RECOVERY ON THE POLICIES, THE DECISIONS OF THE SEVERAL UNITED STATES CIRCUIT COURTS OF APPEALS ARE NOT UNIFORM. AND. THEREFORE, IN THE INTEREST OF UNIFORMITY OF DECISIONS, THE WRIT SHOULD BE GRANTED.

We concur with Judge Caldwell (p. 99) in his statement that the opinion in *Fireman's Fund Insurance Company* v. *Norwood*, 16 C. C. A., 136, "is exactly opposed to the opinion of the majority in this case," as well as the further conclusion of that learned judge to the effect that the judgment in this case is not only "diametrically opposed" to the *Norwood* case, but also to the case of *McElroy* v. *British American Insurance Company*, 94 Fed. Rep.,

990, 1000, in the Circuit Court of Appeals for the Ninth Circuit, and to the case of *London & L. Ins. Co.* v. *Fischer*, 92 Fed. Rep., 500, 34 C. C. A., 503, in the Circuit Court of Appeals for the Sixth Circuit.

We also concur with the statement of Judge Caldwell that the judgment in this case violates the rule of estoppel in pais, which "has been more frequently and effectively applied by the Supreme Court of the United States than by any other Court."

VI.

IT IS UNCONTRADICTED THAT THE GRIEF OF THIS CONTROVERSY WAS ACTUALLY WROUGHT BY THE UNAUTHORIZED AND WRONGFUL INTERLINEATION OF THE WORDS IN THE APPLICATION BY THE AGENT OF THE INSURANCE COMPANY—"PLEASE DATE POLICY SAME AS APPLICATION" (6TH FINDING, P. 32)—AND THAT THE ASSURED NEVER KNEW OF OR CONSENTED TO SUCH WRONGFUL INTERLINEATION.

The scribe, upon reading the fraudulent interlineation, overlooked the agreement contained in the application (p. 12, par. 4), to the effect that the insurance should not be in force until the delivery of the policies and the payment of the premiums, and while dating the policies December 18th, the day the risk was advised, assumed to make the second premium payable as early as December 12th, the date of the application, all for the secret purpose of increasing the agent's bonus (6th finding, p. 32).

This mistake, cheat or fraud, is called by Judge Sanborn a "counter proposition," which, however, was itself not only concealed from the assured at the time of de-

livery and payment, but the full first annual premiums were then exacted, and ever since have been retained, on the emphatic oral and printed representations made by the company that the policies by their terms gave the assured thirteen full months of insurance. To borrow the language of Judge Shiras this was the "nice provision" that induced the business. Even where no representations concerning the terms of the policies were made at the time of delivery and the payment of the premium, this Court has said "he (the assured) had a right to assume that the policy would accurately conform to the agreements thus made, and to rest confidently in that belief."

Equitable Ins. Co. v. *Hearne*, 20 Wall., 494.

Paragraph 2 of the company's amended and substituted answer (p. 20) alleges that the words in the application, "please date policy same as application," amount to "a request that said five policies each should be *issued, dated and take effect* the same date as the application, namely, the 12th day of December, 1893, and said request was complied with, and the policies were so issued."

This is the company's deliberate understanding and interpretation of the meaning and effect to be given to those words. At any rate, its present position is fixed by that part of the answer above quoted as to the natural and actual effect to be given to the so called request of its agent interpolated into the application. Upon this surreptitious and falsified interlineation, admittedly so acted upon by the company as to thus far defeat a recovery upon the policies, the Circuit Court made an express finding (6th finding, pp. 32-3) to the effect that it was inserted by the company's agent after the application had

been signed and delivered to the company without the knowledge of the assured, and it is certain that the assured never learned of it (9, 12, 13, 14 findings, pp. 33-4).

The application as signed and delivered called for a whole year's insurance, not to take effect until the delivery of the policies and the payment of the premium, to-wit: on December 26, 1893 (par. 4, p. 12, and 7th finding, p. 33). This forged interlineation, "please date policy same as application," is construed by the company itself in its own amended and substituted answer as a request (par. 2, p. 20) to have the policies take effect at the date of the application, to-wit: December 12, 1893, and the answer declares that such was the import and result of the interlineation that the company strictly complied therewith in the form of the policies delivered.

McMaster's application called for a whole year's insurance, not from the date of the application, but from the date of the delivery of the policies and the payment of the premium. This was the express agreement (7th finding, p. 33). The falsified interlineation of the company's agent is, therefore, admitted to be diametrically opposed to the express agreement made conclusive upon this Court by the 7th finding (p. 33). The company insists that the policies by their terms are responsive to this falsified interlineation, and not to the agreement found in the 7th finding.

Judge Sanborn says that the policy is a counter proposition to the 7th finding and to the application itself; but the provisions of the application and agreement by express finding are now binding on the parties and the Court.

It is pertinent and proper to insist that the company's own interpretation of the natural meaning and the actual result of the agent's interpolation conclusively makes it the falsified interpolation of the company itself.

The only "request" addressed to the company on this point was its own agent's wrongful interlineation in the application, which the answer of the company (par. 2, p. 20) now makes responsible naturally and actually for the entire grief of this controversy.

Judge Sanborn says that this interpolation (p. 80) is immaterial, first because it was not complied with; and, second, because it misstated no fact which conditioned the insurance; but the defendant's answer (par. 2, p. 20) shows that it was not only a forgery, but a material and inconsistent provision, naturally and logically robbing the assured of his express agreement with the company (7th finding, p. 33). Judge Shiras expressly found that the promise of thirteen months' insurance for the first premium conditioned the insurance. Add to this falsified interlineation the additional falsehoods at the time of the delivery of and payment for the policies (findings 3, 4, 9, 12, 13, 14), and we have both legal fraud and bad faith. The conduct of the company and its agent is certainly worse than any alleged negligence of the assured, and it is pertinent to inquire on whom the loss should fall. Had it not been for this wrongful interlineation by the agent, unknown to and concealed from the assured, the defense to this suit admittedly would not have any basis in the terms of the insurance contracts. The "terms" of the contract exclusively relied on to sustain respondent's only defense are alleged in the answer to be the natural and actual result of the agent's forged instruc-

tion, which are further diametrically opposed to the only agreement, oral or written, known to or made by the assured. The respondent should be estopped from reaping any advantage from this forged interlineation. The respondent ought not to plead its own wrong to forfeit the policy.

Continental Ins. Co. v. *Chamberlain*, 132 U. S., 304.
Union Mut. L. Ins. Co. v. *Wilkinson*, 13 Wall., 222.
Am. Ins. Co. v. *Mahone*, 21 Wall., 152.
N. J. Mut. L. Ins. Co. v. *Baker*, 94 U. S., 610.

Had the assured died prior to December 26th, 1893, the company would have denied the valid existence of any insurance contract, under the terms of the application (par. 4, p. 12), and yet it now says in its answer (par. 2, p. 20) that the policies took effect December 12, 1893, responsive to the agent's forged interlineation, notwithstanding the express agreement of the parties (7th finding, p. 33), repeated in the application, that the contract of insurance was not to take effect until the delivery of the policies, to-wit: on December 26, 1893.

We reiterate that the interlineation, "please date policy same as application," was forged by the agent of the company after the application had been signed and delivered to the company, without the knowledge of the assured, and was affirmatively concealed from the assured, and that the company's own answer says "said application also contained a request (please date policy same as application) that said five policies each should be issued, dated, and take effect the same date as the application, namely, the 12th day of December, 1893, and said request was complied with, and the policies were so issued."

At whose door is laid the cause of plaintiff's loss, if he must lose? The company admits by its answer that this controversy is grounded upon the words, "please date policy same as application," and on the testimony of the agent himself the trial court found this interlineation wrongful and unknown to the assured. Were it not for this interlineation, the payment of the second premium would have been called for at a date certainly not earlier than the actual date of the policy, which would have obviated this whole controversy.

In this connection, the Court should always bear in mind the month of grace thus stated in respondent's answer as well as in its policy (par. 2, p. 20): "this defendant grants to the insured in said defendant company a grace of one month on the payment of premiums." The company was not to be released upon the failure of the assured to pay the second annual premium when it matured; it was only to be released at the end of a full month of grace thereafter.

VII.

THE PETITIONER CONTENDS THAT THE PROVISIONS OF THE WRITTEN AGREEMENTS, WHEN PROPERLY CONSTRUED, DO GRANT THIRTEEN MONTHS OF INSURANCE FOR THE FIRST FULL ANNUAL PREMIUM.

This proposition is so convincingly elaborated by Judge Shiras (Record, pp. 35-52) that we adopt his statement and argument as a ground for the petitioner's prayer for the writ.

The assured paid the first full annual premium, which paid for thirteen months of insurance, counting the month of grace. This much was promised. The representation was positively renewed as an existing fact, under the terms of the completed policies, at the time of their delivery. Having paid for thirteen full months' insurance, the policies are susceptible of a resonable construction that will grant thirteen months of insurance. Whatever may be the effect of the date, December 12th, upon renewals for subsequent insurance, having accepted and retained the first full annual payment, under the written agreement that the insurance should not begin until the delivery of the policies and the payment of the premiums, the assured should not now be subjected to a forfeiture which in effect forfeits insurance already paid for.

VIII.

THE "DUE DATE" OF THE POLICY IS ITSELF AMBIGUOUS, INDEFINITE AND ELASTIC, AND THE ALLOWANCE OF 13 MONTHS' INSURANCE FOR THE FIRST PREMIUM, DOES NOT VARY THE TERMS OF THE POLICY.

The case of *Baxter* v. *Brooklyn Life Ins. Co.*, 119 N. Y., 454, shows that the "due date" of the policy is not fixed or determined by the date written upon the face of the policy, but by a date "after notice and the expiration of the thirty days" provided for in the New York statute. The company had a clear leeway in the giving of notice, and by adjusting the same could have granted thirteen months' insurance without offending against the provisions of the policies, construed in the light of the controlling provisions of the New York statute.

The promise of thirteen months' insurance was the full equivalent of an agreement on the part of the company that it would not attempt to enforce a forfeiture that would deprive the assured of the benefits of the representations made by it to induce the business. That does not involve any question of contradicting a written instrument by parol evidence.

The clause, "if any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall remain the property of the company," is void. The New York statute controls the question of forfeiture. It is not within the power of the parties to add to, limit or set aside the paramount provision of the statute. This clause, therefore, in the policy, as construed by the Circuit Court of Appeals, should be held null and void.

Hurst Home Ins. Co. v. *Muir* (Ky.), 53 S. W. R., 3.

IX.

THE PROVISIONS OF THE POLICIES IN CONTROVERSY ARE UNCERTAIN AND AMBIGUOUS AND DIFFICULT OF INTERPRETATION.

The rule seems to be that the assured should recover if there is created "a doubt as to its (policy) proper interpretation of sufficient gravity to be resolved in favor of the insured."

The masterly opinion of Judge Shiras in this case on this proposition, construing the terms of the policies, as granting thirteen full months of insurance upon their face, should create a doubt as to the difficulty of proper construction of sufficient gravity to warrant a Court in

resolving the question of interpretation in favor of the insured.

But more than this, the cases of *New York Life Ins. Co.* v. *Dingley*, 93 Fed. Rep., 153, in the Circuit Court of Appeals for the Ninth Circuit, and of *Rosenplanter* v. *Provident Sav. & Life Ass. Soc.*, 96 Fed. Rep., 721, in the Circuit Court of Appeals for the Sixth Circuit, show that the respondent company itself, through its own eminent counsel, has never understood or construed these very provisions so as to be able to prepare and use a form of forfeiture notice under the New York statute that has been held sufficient or sustained in any Court. Hundreds of thousands of these notices have been sent out, and the State and Federal Courts alike have found them deficient in interpretation and expression of the very provisions in controversy, read in the light of the notice required by the New York statute for forfeiture. In the face of such a history, it is idle to say that the agreements contain provisions consistent, easily understood and unambiguous.

Moreover, Judge Sanborn indirectly admits that the insurance contracts are inconsistent on the vital propositions involved. The answer admits the month of grace (p. 20). Judge Sanborn says that the year's insurance is reduced by the policy, as a "counter proposition," from twelve months to eleven months and seventeen days, with the month of grace always to be regarded as extra. Not counting at all, therefore, the month of grace, Judge Sanborn says that the "proposition" (the application) calls for twelve months' insurance for the first full annual premium, while the "counter proposition" (the policy) grants insurance for only eleven months and seventeen days.

But the application is itself copied into the policy and became a part of it under the following provision in the policy (p. 6): "This contract is made in consideration of the written application for this policy and of the agreements, statements and warranties thereof, which are hereby made a part of this contract." This provision certainly does not subordinate the agreements of the application to the agreements of the policy. If there is any subordination, it would seem to be the very reverse. It is immaterial whether the application became binding before the policy was issued, for the purpose of this inquiry is satisfied when it is made binding in and as a part of the policy contract. The agreements in behalf of the company in the application are as firmly secured in the policy as are the agreements in behalf of the assured. The policy, therefore, includes as an express part thereof the application (pp. 6 to 14, inclusive), and the application should be controlling. At any rate, Judge Sanborn is forced to admit that the application constitutes one proposition, and the policy a counter proposition on the crucial question; but the proposition and the counter proposition are both parts of the same agreement, and, therefore, necessarily the agreement contains terms both ambiguous and inconsistent. While denying an inconsistent contract, Judge Sanborn most forcibly admits such, and, when admitted, the fatality of his logic is made manifest and his law inapplicable.

We will close this petition for the writ of certiorari with the opening words of Judge Caldwell in his dissenting opinion:

"The right decision of this case does not depend upon any technicalities of law. It is a case in which common sense and common honesty and legal sense and legal honesty are at one."

The petitioner has filed a brief in support of this petition for the writ of certiorari, under separate cover, to which the attention of the Court is earnestly directed.

Wherefore, your petitioner respectfully prays this Honorable Court that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record, and all proceedings of the said Circuit Court of Appeals in the said case therein entitled, Fred A. McMaster, Administrator, Plaintiff in Error, v. New York Life Insurance Company, Defendant in Error, to the end that the said case may be reviewed and determined by this Court as provided by Section 6, of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals," and to define and to regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes, approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court, and your petitioner will ever pray.

Respectfully submitted,

HENRY J. TAYLOR,
FRANK E. GILL,
ERIC A. BURGESS,
Solicitors for Petitioner.

HENRY J. TAYLOR, Sioux City, Iowa,
Of Counsel for Petitioner.

STATE OF IOWA, County of Woodbury, ss:

Henry J. Taylor, being first duly sworn, says that he is one of the solicitors and of counsel for the above named petitioner, and as such has had personal charge, for said petitioner, of the case in the foregoing petition mentioned, in the Circuit Court of the United States, for the Northern District of Iowa, Western Division, and in the United States Circuit Court of Appeals, for the Eighth Circuit; that he has read the foregoing petition for writ of certiorari by him subscribed; and that the facts therein stated are true to the best of his information and belief.

HENRY J. TAYLOR.

Subscribed in my presence and sworn to before me by the said Henry J. Taylor, this 31st day of January, A. D. 1900.

[SEAL.] E. A. BURGESS,
Notary Public in and for Woodbury County, Iowa.

FILED
FEB 6 1900
JAMES H. McKENNEY,
Clerk

BRIEF FOR CERTIORARI.

Br. of Taylor for Petitioner.

In the Supreme Court of the United States.

Filed Feb. 6, 1900.

OCTOBER TERM, 1899.

FRED A. McMASTER, ADMINISTRATOR,

Petitioner,

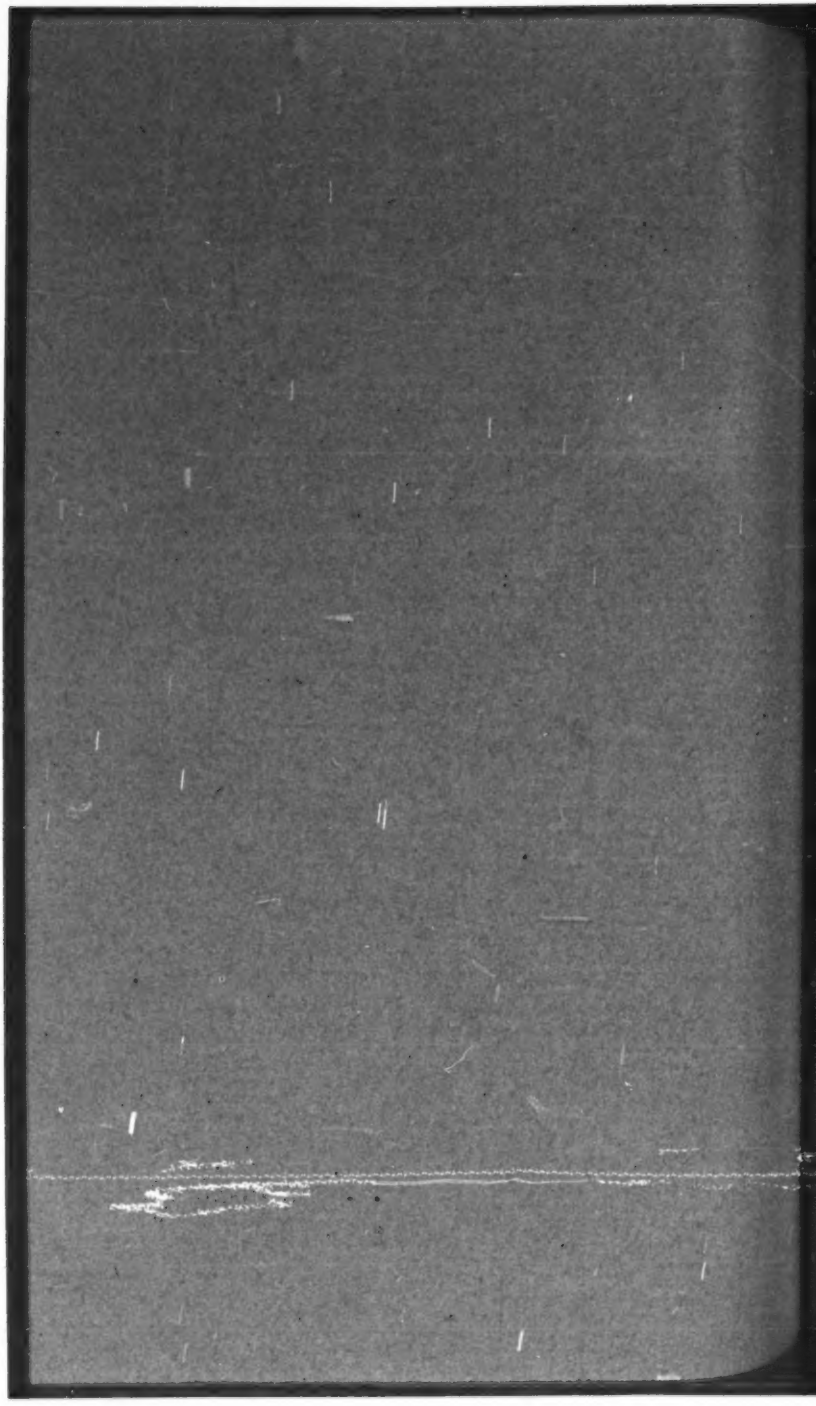
vs.

NEW YORK LIFE INSURANCE CO.,

Respondent.

BRIEF IN SUPPORT OF THE PETITION FOR THE WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

HENRY J. TAYLOR, SIOUX CITY, IOWA,
FRANK E. GILL, SIOUX CITY, IOWA,
ERIC A. BURGESS, SIOUX CITY, IOWA,
Solicitors and of Counsel for Petitioner.



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The divisions of this brief correspond to the divisions of the petition. The brief is designed to supplement rather than to re-state the grounds of the petition.

I.

The petitioner deems the statement of his case in the petition as sufficient for the proper understanding of this brief.

II.

The petitioner assumes that this Court will read the opinions of the several judges who have heard this case. The petitioner adopts the opinions of Judges Shiras and Caldwell as his own statement and argument in support of the petition for the writ of certiorari.

Judge Shiras' opinion is found on pp. 35-52 of the Record.

Judge Sanborn's opinion is found on pp. 71-83 of the Record.

Judge Thayer's opinion is found on pp. 83-4 of the Record.

Judge Caldwell's opinion is found on pp. 84-101 of the Record.

A former opinion of Judge Shiras is printed as an appendix to this brief. As that opinion was written in the equity case between these parties (78 Fed. Rep., 33) we feel warranted in printing it and in asking this Court to read it.

III.

THE SPECIAL FINDING AS TO NOTICE IS INSUFFICIENT TO AUTHORIZE THE JUDGMENT OR TO SUSTAIN THE SAME ON APPEAL.

The special findings of the Circuit Court must be accepted on appeal as of absolute verity.

The failure of the Circuit Court to find an essential fact, or the insufficient or imperfect finding of any fact essential to support the judgment, is fatal to the judgment.

A statement of the legal effect of a document not in the record, nor made a part of the findings, nor its contents anywhere set out or disclosed, is not a finding of fact, but a mere conclusion of law, and is of no force.

The respondent sought to forfeit the policies by giving a notice in deference to the New York statute of forfeiture.

The application declares this insurance contract to be a New York contract (p. 12). The policies refer expressly to this New York statute as Chapter 690, Laws of 1892, of the State of New York (p. 10), and are made payable, in case of loss, in New York State (p. 6), and were there advised, issued and dated, and there proofs of death were to be made (pp. 6, 9). The application is expressly made a part of the policies (Div. 5, p. 12), and it is expressly provided therein "that the contract contained in said policy and in this application, shall be construed according to the laws of the State of New York, the place of said

contract being agreed to be the home office of said company in the city of New York" (p. 12).

The New York statute in force at the time these policies were issued declares:

"No Forfeiture of Policy Without Notice. No life insurance corporation doing business in this state shall declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment, when due, of any premium, interest, or installment or any portion thereof, required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen, and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy, and all payments thereon, will become forfeited and void, except as to the right to a surrender value, or paid up policy, as in this chapter provided. If the payment demanded by such notice shall be made within the time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been

duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given." Laws 1892, C. 690, art. 1, par. 92.

The burden of proof to show that a legal and sufficient notice was properly given rests upon the insurance company. It must show strict compliance with the terms of the statute before it can assert a forfeiture. The requirements of this statute, and each of them, are rigidly enforced under plain, definite and exacting decisions of the Court of Appeals of the State of New York which are adopted in the Federal Courts.

Baxter v. *Insurance Co.*, 119 N. Y., 454, holds that:

"This statute was a part of the contract in question, and governs the rights and liabilities of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy."

See also *Defrece* v. *Insurance Co.*, 136 N. Y., 151.
Phelan v. *Insurance Co.*, 133 N. Y., 147.
Griffith v. *Insurance Co.*, 101 Cal., 627.
Johnson v. *N. Y. Life Ins.*, 78 N. W. R., (Ia.), 905.
N. Y. Life Ins. Co., v. *Dingley*, (C. C. A., 9th Circuit), 93 Fed. Rep., 153.
Rosenplanter v. *Prov. Sav. Life Assr. Soc.*, (C. C. A., 6th Circuit), 96 Fed. Rep., 721.

The only finding of fact on the question of notice, reads as follows:

"10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the State of New York."

There is an utter failure to find any of the requisite facts showing a compliance with the New York statute by the company. The statute requires that the notice shall be mailed "at least fifteen, and not more than forty-five days, prior to the day when the same (premium) is payable."

The general statement that a notice was sent not "later than November 17, 1894," is not the finding of an ultimate fact. It is not a finding that the notice was not sent more than forty-five days prior to the day when the premium was payable. The notice might have been sent sixty days prior thereto, and still the finding would be absolutely true; yet the plain requirements of the statute would not be satisfied.

The statute requires that the notice "shall be duly addressed and mailed to the person whose life is insured." For anything that appears the notice may have been sent to Alaska, unaddressed and by a private messenger.

There is no finding that the letter was properly addressed or mailed to the assured "at his last known post-office address, postage paid."

The finding does not show, as the statute requires, that a written or printed notice was given stating the amount of the premiums due on the policies; the place where and the person to whom the premiums should be paid; nor that the notice was sent to the assured properly addressed, prepaid and mailed within the period of time required by the statute; nor that a notice was sent notifying the assured when the premiums would become due and payable; nor that unless the premiums were paid the

policies and all payments thereon would become forfeited and void as provided by the statute.

The only finding that even attempts to satisfy the requirements of the New York statute, is the latter part of this 10th finding: that a notice was sent "in accordance with the requirements of the statute of the state of New York."

But this clause must be construed in reference to and limited by the finding that the notice was "of the coming due of the premiums on the policies" in controversy, and such a restricted notice is wholly insufficient and fatal, for it omits a dozen other equally essential requisites, even if sent "in accordance with the requirements of the statutes of New York," as to this one particular. In assuming to state one of the terms of the notice, the finding should be held to exclude others not mentioned. If the finding should be held to refer to the notice set out in the answer (p. 20, par. 4), then the notice given was fatally defective.

Inasmuch as none of the essential contents of the notice are found, nor anywhere given, the last clause of the 10th finding is without force or effect to sustain the judgment, because it states a mere conclusion of law, and not the finding of an ultimate fact. The general statement that a notice was sent "of the coming due of the premiums" at some unstated time does not sufficiently state the ultimate fact.

U. S. v. *Harris*, 77 Fed. Rep., 825.
Cooper v. *French*, 52 Ia., 531.
12 Ency. Pl. & Pr., pp. 1038-1046.
Daube v. *Phil. Ry. Co.*, 77 Fed. Rep., 715-6.

"Findings of fact which merely announce certain legal conclusions deducible from facts not stated are not sufficient to support a judgment."

8 Ency. Pl. & Pr., 943.
Kane v. *Rippey*, 22 Ore., 299.

The burden of proving a strict compliance with all the essential requirements of the statute being upon the insurance company, and the special findings being silent as to every essential fact of notice, the Court is bound to infer an insufficient notice, for nothing can be supplied to such findings by intendment. Every essential fact to support the judgment must affirmatively appear in the findings.

U. S. v. *Harris*, 77 Fed. Rep., 821, 825.

See the dissenting opinion of Judge Caldwell, p. 101 of the Record.

IV.

THE CASE WAS TURNED ON THE RULE OF PAROL EVIDENCE. IT SHOULD HAVE TURNED ON THE DOCTRINE OF EQUITABLE ESTOPPEL.

Judge Sanborn says:

"This is another attempt to cause prior and contemporaneous parol statements of the terms and legal effect of written agreements to prevail over the plain stipulations of the writings themselves."

Not at all. Judge Sanborn, we submit, has entirely missed the point and distinction contended for. He confounds the rule that a written contract cannot be changed by parol evidence with the doctrine of equitable estoppel.

Everything that Judge Sanborn says may be conceded to be true, and still a recovery be had upon the policies in controversy by the application of the doctrine of waiver or equitable estoppel.

The insurance company by its conduct has estopped itself from insisting that the policies delivered gave less than thirteen months of insurance for the first annual premium, because to do so would result in the perpetration of a legal fraud. This does not involve any inconsistency between the parol evidence rule and the doctrine of equitable estoppel; but if it does, then the former must give way to the latter. The parol evidence rule is itself not a rule of evidence. It is rather an inhibition against evidence, for various reasons, chief among which is that solemn writings are more trustworthy than memory, all in the interest of ascertaining and enforcing justice and honesty.

The parol evidence rule, however, is not the only rule that Courts have recognized or permitted to control. The doctrine of estoppel is perhaps the greatest legal principle of modern times in its elasticity and efficiency to prevent the perpetration of wrong. If a writing dominated by the parol evidence rule has been procured through fraud, deceit, overreaching, or in any way that puts fair play and honest dealing to shame as a matter of intention or ultimate result, then the sanctity of the written instrument is removed, and the party claiming under it is disabled to so use it as to impose a loss or hardship upon the party overreached or to consummate a fraud. The doctrine of estoppel then steps in with a voice of supreme authority and declares that the written instrument has forfeited its right to invoke the parol evidence rule, be-

cause procured through mistake, fraud or deceit, things that cannot be tolerated in a court of justice.

To put it another way, a writing can never insist on the parol evidence rule unless it is a writing of good, equitable reputation. If it is shown to be a fraud and a cheat, its right to command must cease, and its voice must be silenced by the supreme doctrine of equitable estoppel, which brooks no opposition to its purpose of rendering fraud ineffectual.

This is the contention of Judges Caldwell and Shiras.

We concur with Judge Caldwell, who, in righteous indignation, says: "Not one case cited by the majority is an authority *on the facts of this case.*"

If the written agreements in controversy do not permit thirteen full months of insurance for the first full annual premium then these agreements have so bad a reputation that the application of the doctrine of equitable estoppel becomes controlling, and must abrogate the parol evidence rule.

It is conceded that the month of grace (p. 9) in connection with the application procured the agreement for thirteen months' insurance. (Findings 3, 4, 7, 8, 9, 12, 13 and 14, pp. 32-35.)

This Court has said (*Ins. Co.* v. *Hearne*, 20 Wall., 490) that he (the assured) "had a right to assume that the policy would accurately conform to the agreements thus made, and *to rest confidently in that belief.*"

Judge Sanborn admits that the policy in controversy is a "counter proposition" upon the one controlling representation that induced the insurance, and that it grants

insurance, not for thirteen months, as was admittedly agreed, but for only twelve months and seventeen days. In other words, that the "counter proposition" deprives the assured of nearly one-half of the extra month of grace feature, which was successfully heralded by the agent, and "by circulars issued by the company" (3d finding, p. 22), and by provisions printed on the back of the policy itself.

Conceding for the purpose of this argument that the policy does not grant thirteen months of insurance, the agent knew this. To have delivered such a "counter proposition" without advising the assured that there was a counter proposition would have amounted to fraudulent concealment. But that is not the case. The assured was prevented from reading the policies by the agent's statement of their terms, and trusted to the honesty of the insurance company by asking whether the policies were as represented, and the company responded, "yes." To make sure that the vital inducement had not been overlooked, he further crowded the inquiry and asked if they (the policies) did insure him for the period of thirteen months, to which the agent replied that they did so insure him, and, thereupon, in reliance upon these representations of the company as to existing facts concerning the completed policies, accepted them, placed them away unread before the eyes of the agent, who there and then reached out his hand and received "the full first annual premium, or the sum of $21 on each policy" (9th finding, pp. 33-4), and went his way rejoicing in the security of his "bonus" (6th finding, pp. 32-3).

But the record shows more than "a counter proposition." It shows a contemptible fraud, the fruits of which

the company strives to secure under the parol evidence rule, and the petitioner, as his last and only recourse, asks this Court to take his case and prevent iniquity by enforcing an estoppel in pais.

Judge Thayer in his concurring opinion assumes that the representations of the agent to be material had to be made with intent to deceive or mislead. But neither a fraudulent purpose nor an intent to deceive or mislead is essential to the application of the doctrine of equitable estoppel.

Leather Manufacturers Nat'l Bank v. *Morgan*, 117 U. S., 96.
Dickerson v. *Colgrove*, 100 U. S., 580.
2 Pomeroy Eq. Jur., Sec. 805.
Dair v. *United States*, 16 Wall., 1-4.

See also petition for rehearing, Record, pp. 113-17.

It is always enough if the conduct or representations naturally result in accomplishing a legal fraud.

"It has long been held that where it is a breach of good faith to allow the truth to be shown, there an admission will estop."

Bank v. *Morgan*, 117 U. S., 96.

The doctrine of equitable estoppel may be applied in a law action.

Barnard v. *German American Seminary*, 49 Mich., 444.
Kirk v. *Hamilton*, 102 U. S , 777.
John Shilleto Co. v. *M'Clung*, 45 Fed., 778.
Ins. Co. v. *Wilkinson*, 13 Wall., 222.

In this case the insurance agent represented the respondent, New York Life Insurance Company, "anything in the application or policy to the contrary notwithstanding," and his statements and agreements are the statements and agreements of the company itself.

Assurance Soc. v. *Clements*, 140 U. S., 226.
Indemnity Company v. *Berry*, 1 C. C. A., 561.
Cook v. *Association*, 74 Iowa, 746.
Continental Life Ins. Co. v. *Chamberlain*, 132 U. S., 304.
N. Y. Life Ins. Co. v. *Russell*, 77 Fed. Rep., 94.
Washington Central Bank v. *Hume*, 128 U. S., 195, 206.
Joyce on Insurance, Sec. 194.

Broader than the rule of parol evidence against varying or contradicting the writing, is the doctrine that one cannot use an instrument procured through mistake, fraud or deceit to perpetuate the same. The assured never assented to this unknown, unsuspected, undisclosed and concealed "counter proposition."

Union Ins. Co. v. *Wilkinson*, 13 Wall., 222, 236.
Continental Life Ins. Co. v. *Chamberlain*, 132 U. S., 304.
Phœnix Ins. Co. v. *Allen*, 109 Ind., 273.
Plumb v. *Insurance Company*, 18 N. Y., 392.
Howe v. *Provident Soc.*, 34 N. E. R., 830, 1-2.
Insurance Company v. *Leon*, 37 N. E. R., 584.
Sullivan v. *Insurance Company*, 34 Kan., 170.

"The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident, or mistake, or fraud, the principle has been long

recognized that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. A rule of evidence adopted by the courts as a protection against fraud and false swearing would, as was said in regard to the analogous rule known as the statute of frauds, become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. * * * It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels in pais. The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim."

Union Ins. Co. v. *Wilkinson*, 13 Wall., 222, 236.

V.

THE DECISIONS OF THE SEVERAL UNITED STATES CIRCUIT COURTS OF APPEALS UPON THE PROPOSITIONS OF LAW PRESENTED BY THIS CASE ARE NOT UNIFORM, AND IN THE INTEREST OF JURISPRUDENCE THE WRIT SHOULD ISSUE FOR THE SAKE OF UNIFORMITY OF DECISION, APART FROM THE QUESTION THAT THE MATTER IS OF SUFFICIENT IMPORTANCE IN ITSELF TO INVOKE THE WRIT.

The case of *McElroy* v. *British America Ins. Co.*, 94 Fed. Rep., 990, 1000, would manifestly sustain a recovery in

this case. In that case the Circuit Court of Appeals for the Ninth Circuit considered the questions presented in this case on reason and authority, and used these words:

"It would certainly have been an act of prudence on his part to read the entire policy, but his neglect to do so cannot excuse the company for the default of the agent in not writing the contract in accordance with the representations made by the insured. The insured had a right to rely upon the agent's performing his duty of making the contract in conformity with the information given; and the agent's failure to do so, whether the result of a mistake or of a deliberate fraud, cannot operate to the prejudice of the insured. The contract of insurance is preeminently one that should be characterized by the utmost good faith on both sides."

So the Circuit Court of Appeals for the Sixth Circuit considered the questions in the case of *London & L. Fire Ins. Co.* v. *Fischer*, 92 Fed., 500, 34 C. C. A., 503, and its decision would also authorize a recovery upon the policies in controversy.

Indeed, Judge Caldwell, in his dissenting opinion, page 99, contends that the decision in this case is "diametrically opposed" to the case of *Fireman's Fund Ins. Co.* v. *Norwood*, 16 C. C. A., 136, 69 Fed. Rep., 71, of the Circuit Court of Appeals for the Eighth Circuit, as well as contrary to the *McElroy* case in the Ninth Circuit, and the *Fischer* case in the Sixth Circuit, supra.

The decisions of the state courts with substantial uniformity would permit a recovery on the policies in controversy.

VI.

IT IS UNCONTRADICTED THAT THE GRIEF OF THIS CONTROVERSY WAS WROUGHT WITHOUT THE KNOWLEDGE OR CONSENT OF THE INSURED BY REASON OF THE WRONGFUL INTERPOLATION IN THE APPLICATION BY THE AGENT OF THE INSURANCE COMPANY OF THE WORDS, "PLEASE DATE POLICY SAME AS APPLICATION." (6TH FINDING, P. 32). THIS WAS DONE "BY THE AGENT IN ORDER TO SECURE TO THE AGENT A BONUS WHICH THE COMPANY ALLOWED TO AGENTS FOR BUSINESS SECURED DURING THE MONTH OF DECEMBER, 1893."

The application was dated December 12th (p. 12). The policy was issued and dated in New York City December 18th (p. 6). The application, as well as the agreements, expressly provide (Div. 4, p. 12): "That any policy which may be issued under this application shall not be in force until the actual payment to and acceptance of the premium by said company." The policies were delivered and the premiums paid in Sioux City, Iowa, on December 26.

It is also uncontradicted that the assured under the agreement was to have thirteen full months of insurance for the first annual premium. The insurance company read the illegal interlineation, "please date policy same as application" (p. 11), and, notwithstanding the provision that the policies should not be in force until their delivery and the payment and acceptance of the first premium, made the second annual premium payable on December 12th, the date of the application, although the policies were not delivered or paid for, or in force until December 26th, and were not written up or issued or dated until

December 18th. Had the second annual premium been made payable on December 18th, the right to recover would have been conceded without litigation.

The Circuit Court found:

"Relying on the benefits of this provision and in the belief that if he accepted a policy of insurance upon his life, from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed, since the last payment of the annual premium, the said Frank E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on and attached to the petition, the same being made part of this finding of facts." (4th finding.)

"The five policies enclosed in envelopes on or about December 26th, 1893, were taken by F. W. Smith, the agent of the defendant company to the office of Frank E. McMaster, who asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him, and thereupon McMaster paid the agent the full first annual premium, or the sum of twenty-one dollars, on each policy, and without reading the policies he received them and placed them away.

"The agent did not in any way attempt to prevent McMaster from reading the policies, and he had the full opportunity for reading them, but in fact did not read them, and accepted them on the statement of the agent of the company, as hereinabove set forth." (9th finding.)

Judge Sanborn, p. 79, admits that the policies were not responsive to the applications. He says:

"The applications were nothing but a proposition to take insurance. They were not contracts, but mere requests for, or a proposition to take, policies. The company was not bound to grant these requests or to accept the proposition. It had the right to reject them *in toto* or to reject some parts of them and to make a *counter*

proposition. It took the latter course. *It rejected some parts of the applicant's proposition and made a counter proposition.*"

The policy by its terms makes the application a part of the contract (p. 6).

Thirteen full months of actual insurance for the first premium, as represented by the company in its printed circulars and by its agent, was the dominant and controlling inducement to the contract of insurance. It was, therefore, dishonest and fraudulent to present a counter proposition which eliminated the sole inducement to the contract, without even advising the assured that the policies contained a "counter proposition." It was doubly dishonest for the company, through its agent, to stand up and in the face of the assured, in response to his exacting and searching inquiries, proclaim as strong as language is capable of putting it, that the policies contained no counter proposition, but by their terms furnished thirteen months of insurance for the first premium, and were in all respects as represented, intending and knowing that its representations of existing facts at the moment of delivery, in the midst of an interruption, induced the immediate payment of the full first annual premium, put the assured off his guard, and induced him to put the policies away unread.

"Counter proposition" is a mere term, but even that could not be sanctioned under a delivery of the policies in silence, and much less under a delivery accompanied by false representations of existing facts as disclosed in this controversy.

In *Equitable Ins. Co.* v. *Hearne*, 20 Wall., 494, this Court said:

"The policy was intended to put the contract in a more full and formal shape. The assured was bound to read the letters of the company in reply to his own with care. It is to be presumed he did so. He had a right to assume that the policy would accurately conform to the agreement thus made, and to rest confidently in that belief."

The opinion of Judge Caldwell upon this proposition is so elaborate and convincing that we again secure brevity in this brief by adopting his arguments.

VII.

A REASONABLE CONSTRUCTION OF THE POLICIES WOULD PERMIT A RECOVERY TO BE HAD UPON THEM.

The two opinions of Judge Shiras, appendix to this brief, and pp. 35-56 of the Record, as a matter of construction, establish the ambiguity of the written agreements, and demonstrate that the provisions of the written agreements of the parties, if properly construed, grant thirteen months' insurance for the "first full annual premium."

The application that is made a part of the policy, and preceded it in time, restates the agreement of the parties on the point (Div. 4, p. 12): "that any policy which may

be issued under this application shall not be in force until the actual payment to, and acceptance of the premium, by the company." It necessarily follows, therefore, that the contract of insurance went into effect only on delivery of the policies and the payment of the premiums therefor, to-wit : on December 26, 1893. But the company exacted "the full first annual premium, or the sum of $21 on each policy" (9th finding, p. 33). On the face of the policy, in conspicuous location, are the words "annual premium, $21" (p. 6). The assured, therefore, bought and paid for a full year's insurance from December 26, 1893, to which must be added the special inducement of an extra month of grace (p. 9), which admittedly was a special feature of this company's policies, that both attracted and secured the insurance in controversy.

The date or payment of the second annual premium may possibly have some force in connection with insurance for subsequent years, but was never intended, and ought not to be permitted, to chop off thirteen days' insurance, for which the company received, and still retains, payment. Unquestionably the assured bought thirteen months' insurance for $105. The provision that the policy should not go into effect until it was delivered and paid for was material, and would have been asserted by the company if necessary. That provision, if inconsistent with other provisions in the policy, is still a part of the policy, because the application is expressly so made, and preceded the policy in time, and should be held to control in respect of the understanding of the amount

of insurance secured to the assured for "the full first premium."

Whether the right to continue the policy in force for subsequent years became fixed by the date, December 12th, on the face of the policy, is immaterial, but the company ought not to be permitted to use that date to reduce the period of insurance for which it received, and still retains, the assured's money. The assured was entitled to the insurance *already paid for*, to-wit: thirteen months of insurance, whether he made the second annual premium payment on the 12th of December or not. It is an unjust and unreasonable construction to say that the company intended to grant the assured thirteen months' insurance and received full payment therefor by the payment of the full first annual premium, and then adroitly worded its policy in such a way that the assured could not get thirteen months of insurance for the full first annual premium, but must also pay the full second annual premium in order to get that which the company evidently contemplated he should receive without the payment of the second annual premium.

The month of grace is a whole month. No construction is reasonable that takes away thirteen days of the month of grace. Either there is a whole month of grace or there is no grace at all. That appears to be self evident. The company and the assured agreed that there should be no insurance from the date of the application, December 12th, to the date of the delivery of the policy, and the payment therefor, December 26th. It is so nominated in the bond (Div. 4, p. 12), and the same is made a part of the policy (Div. 5, p. 12). The company was not entitled,

therefore, to payment for this period of non-insurance, and, inasmuch as it clearly stipulated in writing when the policy should go into force, that stipulation should be made effective; and as the company collected and received "the full first annual premiums," it should be held to have sold the assured that which he bought and paid for, namely, a full year's insurance, plus the additional month of grace.

If the *second* annual premium had been made payable on the date corresponding to the date of the policy, December 18th, then this controversy would never have arisen.

Packhill v. *Brighton*, 61 Iowa, 103.
Iowa Code of '97, Sec. 23, p. 125.
Sec. 26, Chap. 677, New York Laws, 1892.

The clause, "if any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall remain the property of the company," contravenes the New York statute and is void. The New York statute fixes the only possible grounds or manner under which a forfeiture may be successfully declared and enforced. It is not within the power of the parties to add to, limit or set aside the paramount provisions of the statute. This clause, therefore, in the policy, as construed by the Circuit Court of Appeals, should be held null and void.

Hurst Home Ins. Co. v. *Muir*, (Ky.) 53 S. W. R., 3.

VIII.

THE "DUE DATE" IS AMBIGUOUS, INDEFINITE AND ELASTIC, AND THE ALLOWANCE OF 13 MONTHS' INSURANCE FOR THE FIRST FULL PREMIUM DOES NOT VARY THE TERMS OF THE POLICIES.

The opinion in *Baxter* v. *Brooklyn Life Ins. Co.*, 119 N. Y., 454, holds that the due date is not fixed by the nominal date of premium payment on the face of the policy, but by the expiration of thirty days after giving the statutory notice. And the dissenting opinion in that case emphasizes the holding of the majority to be that "the premium does not become due until after notice and expiration of the thirty days." The due date, therefore, of the premium, under the *Baxter* case, *supra*, is fixed by the New York statute, and not by the face of the policy, and may be postponed beyond the policy date of December 12th, simply by delay in giving the statutory notice. The company had a leeway in the giving of this notice of at least thirty days, and, therefore, was able to extend the due date without violating the terms of any agreement whatever, and at the same time fulfill its promises and representations, because the due date is determined by the New York statute, and is made to depend upon the giving of the notice. The time when the notice shall be given, or, indeed, the fact of giving any notice at all, finds no expression in the agreements of the parties; nor would delay enough in giving the notice to keep good the promise of the company, run against the rule of parol evidence.

This point is more fully argued in the petition for rehearing, pp. 121-8 of this Record.

When policies of insurance contain contradictory, conflicting or inconsistent provisions, effect will be given to the provisions most favorable to the insured, and that construction will be adopted which is most favorable to the insured.

National Bank v. *Insurance Co.*, 95 U. S, 673.
Grace v. *American Central Ins. Co.*, 109 U. S., 278.
Moulor v. *American Life Ins. Co.*, 111 U. S., 335.
American Surety Co. v. *Pauly*, 170 U. S., 133.
Travellers' Ins. Co. v. *McConkey*,
127 U. S., 661, 666.
Thompson v. *Phenix Ins. Co.*, 136 U. S., 287, 297.
Imperial Fire Ins. Co. Coss County,
151 U. S., 452, 462.
Indemnity Co. v. *Dorgan*, 16 U. S. App., 290, 309;
7 C. C. A., 581; 58 Fed. Rep., 945.
Insurance Co. v. *Randolph*, 24 C. C. A., 305; 78
Fed. Rep., 754, 761, 762.

Under rules of proper construction, these policies should be construed to grant thirteen full months of insurance for the payment of the first annual premiums. This argument is elaborated by Judge Shiras (Rec., pp. 35-52) in such a lucid and masterly manner that we hesitate in doing more in this brief than merely suggesting the point to the Court.

The month of grace (p. 9; par. 2, p. 20) is an admitted extra month that went to make up the thirteen months' insurance, so we may lay aside that month as a benefit secured and conceded.

The right to continue the policy under renewals was not discussed. But the right to thirteen full months of insurance for the first annual premium was reiterated as

the controlling inducement for the insurance. The agreements in controversy should admit of a construction that would grant a full year's insurance for the first annual premium, plus an additional month of grace, regardless of the question of future insurance. The month of grace is always to be considered as an indulgence or security, as a gratuity (p. 20). It is admitted that the company was paid and retains the price of thirteen months' insurance, and that if this judgment shall stand the insured will be cheated out of thirteen days. The forfeiting provisions should be construed as effecting the rights of renewals, that is, as effecting a continuation of the policies in force in subsequent years, and not as a limitation upon the time for which the premium had already been paid. Having paid for thirteen months' insurance the assured should not be subjected to a forfeiture which in effect partly forfeits the payment already made.

"It is claimed that the policy was forfeited *eo instanti* upon October 30, 1895, because the second quarterly premium was not paid upon that date. This contention is based upon a clause of the policy which declares that this policy "shall be *ipso facto* null and void if premiums are not paid when due." The construction of the policy here contended for would recognize and approve a harsh doctrine indeed. It would be carrying the doctrine of forfeiture to unconscionable lengths. By payment of the first quarterly premium, the deceased was insured for three months. This was necessarily the contract between the parties. This clause of forfeiture for nonpayment of premiums was never intended to forfeit the privileges of insurance already paid for. No insurance policy ever attempted to do such a thing. This contention, if sound, would not only result in the forfeiture of present paid-up insurance, but would result in the forfeiture of a portion of the premium already paid."

Methvin v. *Fid. Mut. Life Ass'n*, 58 Pac. Rep., 387.

IX.

THE CONTROVERTED PROVISIONS OF THE POLICIES ARE DIFFICULT OF INTERPRETATION, UNCERTAIN AND AMBIGUOUS.

Upon this proposition, we would ask the Court to carefully consider the cases cited by Judge Caldwell, and especially *N. Y. Life Ins. Co.* v. *Dingley*, 93 Fed. Rep., 153, and *Rosenplanter* v. *Providence Sav. Life Assr. Soc.*, 96 Fed. Rep., 721, in which the Circuit Courts of Appeals of the Ninth and Sixth Circuits show the difficulty of interpretation under the New York statute relating to forfeitures. The *Dingley* case sets out the New York statute and also sets out a notice doubtlessly prepared and used in hundreds of thousands of cases by the respondent herein, and holds the notice fatally defective. The same kind of a notice was given in this case.

The fact is disclosed by the *Dingley* case, and, indeed, by all the cases cited by Judge Caldwell from New York State and the Federal Courts, that the respondent company itself has never been able to prepare a form of notice under the New York statute and its form of policy sufficient to work a forfeiture for nonpayment.

This would seem to be sufficient proof of the difficulty of interpretation and the uncertainty and ambiguity of the provisions of the agreements in controversy to warrant this Court in saying, as was said in *Fidelity & Casualty Co.* v. *Lowenstein*, 97 Fed. Rep., 20, that there is created "a doubt as to its proper interpretation of sufficient gravity to be resolved in favor of the insured."

Not only is the counter proposition (the policy) a part of the same agreement as the application (proposition) between which there is a loss to the assured of thirteen days' insurance as conceded by Judge Sanborn, but the application contains the provision (p. 12), "that any policy which may be issued under this application shall *not* be in force until the payment to and acceptance of the premium by said company;" with which should be considered the 7th finding, as follows, to-wit:

"By the express understanding had between F. W. Smith, the agent of the New York Life Insurance Company, and Frank E. McMaster, when the application for insurance was signed, it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies, and that the contract of insurance was not to take effect until the policies were delivered;" and the further provision of the falsified interlineation, "please date policy same as application," the meaning of which is construed in the defendant's answer as controlling the insurance (par. 2, p. 20), in the following words, to-wit:

"Said application also contained a request that said five policies each should be issued, dated and take effect the same date as the application, namely, the 12th day of December, 1893, and said request was complied with, and the policies were so issued;" which likewise involves a proposition and counter proposition to the extent of thirteen days' variation in the time when the insurance went into effect. Provisions thus diametrically opposed to each other would seem to make manifest the inconsistency and ambiguity of the insurance contract, and thus furnish the basis for a rule of construction permitting a recovery.

X.

THE EFFORT OF PETITIONER TO SECURE THE WRIT OF CERTIORARI IN THE EQUITY CASE SHOULD NOT PREJUDICE HIS RIGHTS IN THIS LAW CASE.

Judge Sanborn suggests that the views expressed in the opinion of the Circuit Court of Appeals in the equity suit (N. Y. Life Ins. Co. v. McMaster, 87 Fed. Rep., 63) met with the approval of this Court, because an application to have the writ of certiorari issued to review that decision was denied (171 U. S., 687).

The evidence in this law case was taken anew, and the special findings of Judge Shiras settle for this case material facts to the very opposite of what the Circuit Court of Appeals assumed to be true in the equity case. The evidence in this case is materially different, and the findings settle in favor of the assured material questions which in the equity suit were left in controversy, and, indeed, determined adversely to the petitioner. As Judge Caldwell says:

"Not one case cited by the majority is an authority on the facts of this case. Even the decision of this Court, when this case was here on a bill to reform the policy, is not in point in this case because some of the material facts found by the Circuit Court in this case, and which are conclusive upon this Court now, were disputed and denied by this Court in the equity case."

This Court has never considered this case, and it will not be claimed that the equity suit has any binding force upon this. The opinion of Judge Shiras in the equity suit is found in 78 Fed. Rep., 33, and is thought to be sufficiently pertinent and perspicuous to ask this Court to

read the same, and to that end said opinion is printed as an appendix to this brief.

CONCLUSION.

The petitioner respectfully asks this Court to direct a judgment in his favor if permissible under the law (Ft. Scott v. Hickman, 112 U. S., 150); but if not so permissible, then he asks that the judgment of the Circuit Court of Appeals and of the Circuit Court be reversed and the case remanded with suitable instructions to the Circuit Court to grant a new trial.

Respectfully submitted,

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APPENDIX.

McMASTER v. NEW YORK LIFE INS. CO.

(Circuit Court, N. D. Iowa. W. D. January 4, 1897.)

Bill to reform five policies of insurance, issued upon the life of Frank E. McMaster.

F. E. Gill for complainant.

Park & Odell and Swan, Lawrence & Swan for defendant.

SHIRAS, District Judge. From the evidence submitted in this case it appears that the New York Life Insurance Company, whose home office is in the city of New York, in the year 1893 was engaged in the business of life insurance at Sioux City, Iowa; that in the month of December, 1893, five contracts of insurance were entered into between the company and one Frank E. McMaster, then a resident of Sioux City; that the conditions attached to and forming part of the policies the company was then issuing contained, among other provisions, the following:

"All premiums are due and payable at the home office of the company, unless otherwise agreed in writing, but may be paid to agents producing receipts signed by the president, vice president, second vice president, actuary or secretary, and countersigned by such agents. If any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall remain the property of the company."

"After this policy shall have been in force three months, a grace of one month shall be allowed in payment of subsequent premiums, subject to an interest

charge of five per cent. per annum for the number of days during which the premium remains due and unpaid. During said month of grace, the unpaid premium, with interest, as above, remains an indebtedness due the company, and, in the event of the death during the said month, this indebtedness will be deducted from the amount of the insurance."

It further appears that in December, 1893, one F. W. Smith was engaged in soliciting insurance on behalf of the defendant company at Sioux City, and was the person who secured the application for insurance from F. E. McMaster; and in his testimony he says that when soliciting the insurance, he called McMaster's attention to the 30 days' grace that was allowed in payment of premiums, and further stated to him that the payment of the premium on the delivery of the policy would carry his insurance over a period of 13 months; and this witness further testified that when McMaster signed the application which was filled out by the witness nothing was said therein about the date of the policy, but that subsequently the witness, without the knowledge of the applicant, inserted therein the words, "Please date policy same as application;" that this was done because the company was paying an extra bonus of seven dollars per thousand for all insurance obtained in the year 1893, and it was desirable to have the policy bear date of that year, in order to secure the bonus to the agent obtaining the insurance. The application bears date December 12, 1893, but the policies, when issued, were dated December 18, 1893, and each reads as follows:

"The New York Life Insurance Company, by this policy of insurance, doth promise and agree to pay one thou-

sand dollars at its office in the city of New York to the insured's executors, administrators, or assigns, immediately upon receipt and approval of proofs of death, during the continuance of this policy, of Frank E. McMaster, of Sioux City, in the county of Woodbury, state of Iowa (herein called the 'insured'). This contract is made in consideration of the written application for this policy, and of the agreements, statements and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and ——— cents, to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy. * * * The benefit and provisions placed by the company on the next page are part of this contract, as fully as if recited over the signature thereto affixed."

The provisions thus referred to contain, among others, those already set forth at length. It further appears that the first year's premium of $21 on each of the five policies was paid by the insured on the 26th day of December, 1893, and the policies were then delivered to him. It also appears that no further payments of premiums were made; and that Frank E. McMaster died at Sioux City on the 18th day of January, 1895; that the present complainant was duly appointed administrator of his estate; that, upon demand made, the defendant company refused to pay the amount called for by the policies, upon the ground that the policies had lapsed for nonpayment of the second premiums thereon; that thereupon the administrator brought an action at law in this court upon the policies, which is still pending, and afterwards filed the present bill to procure a reformation of the policies, by changing the date of payment of the second and subse-

quent premiums from December 12th to December 18th, on the ground that the date named in the policies, to-wit, December 12th, is an error, and does not correctly represent the actual contract existing between the parties. The action of complainant in filing the present bill was doubtless brought about by the intimation given by the court when the law action was before the court upon demurrer—that in that action the date of the payment of the second premiums must be held to be in fact that named in the policies, and that, no matter what the facts were, a court of law must construe the contract of insurance as it was written, and that, if it did not correctly represent the contract of the parties, resort must be had to a court of equity for the reformation thereof.

The questions presented upon the record have been very fully and ably argued by counsel, and, with the assistance thus afforded, I have examined the contract of insurance, and have reached the conclusion that the right of recovery is not dependent upon the date when the second year's premiums are made payable by the terms of the policies. In determining the true construction of the contract between the company and the insured, regard must be had to all of its provisions, and furthermore, if there is uncertainty and ambiguity with regard to some of the provisions of the contract, resulting from the language used in different clauses thereof, that construction most favorable to the insured must be adopted, upon the familiar principle that, as it is the company that prepares the contract, the insured not being consulted with regard to the form thereof, all doubts in regard to its meaning must be solved against the company. *National Bank* v. *Insurance Co.*, 95 U. S., 673; *Grace* v. *Insurance Co.*, 109 U. S., 278, 3 Sup. Ct., 207; *Moulor* v. *Insurance Co.*, 111 U.

S., 335, 4 Sup. Ct., 466. The contract is not one which, by its express terms, is to terminate at a given or named date. It is provided, in the conditions annexed to the policy proper, that if the insured should be living on the 12th day of December, 1913,—that is, 20 years after the date of the policy—and should have made due payment of the premiums, then the insured could convert the policy into cash, or into a paid up policy, or into an annuity. Until this date, however, should be reached, the continuance of the policy is made dependent upon two contingencies, to-wit: the continuance of the life of the insured, and the payment of the premiums called for by the terms of the policy. When the first year's premiums were paid, and the policies were delivered to the insured, they constituted contracts for the life of the insured, subject to be forfeited by the nonpayment of premiums according to the terms of the policies, or, after the lapse of 20 years, to be converted as already stated. Thus, in *Insurance Co.* v. *Statham*, 93 U. S., 24, it is said:

"We agree with the court below, that the contract is not an assurance for a single year, with the privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for nonpayment of any of the stipulated premiums."

In construing the contract of the parties and their acts in connection therewith, the rule is to avoid forfeiture when it may be fairly done. Thus, in *Insurance Co.* v. *Norton*, 96 U. S., 234, it is ruled by the Supreme Court that:

"Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And,

where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made. It is true, we held in the *Statham* case, 93 U. S., 24, that, in life insurance, time of payment is material, and cannot be extended by the courts against the assent of the company. But where such assent is given, the courts should be liberal in construing the contract in favor of avoiding a forfeiture."

In *Insurance Co.* v. *Eggleston*, 96 U. S., 572, it is declared:

"That courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company, which leads a party insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract."

In *Thompson* v. *Insurance Co.*, 104 U. S., 252, it is said:

"We do not accept the position that the payment of the annual premiums is a condition precedent to the continuance of the policy. That is untrue. It is a condition subsequent only, the nonperformance of which may incur a forfeiture of the policy or may not, according to the circumstances. It is always open for the assured to show a waiver of the condition, or a course of conduct on the part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be exacted."

To the same effect are the rulings in *Insurance Co.* v. *Doster*, 106 U. S., 30, and *Insurance Co.* v. *Russell*, 144 U. S., 439, 12 Sup. Ct., 671.

Bearing these principles in mind, let us now consider what the contract was which the parties entered into, and whether the same was in force at the date of McMaster's death. In the application signed by McMaster it is stated that the sum to be insured was $5,000, the premium to be payable annually on the ordinary life table. As already stated, when the solicitor for the company was seeking to induce McMaster to apply for insurance, he called his attention to the clause in the provisions annexed to the policies issued by the company, wherein it is provided that after a policy has been in force three months, then a month's grace is allowed in the payment of the next premium, and thus, when the first annual payment is made in full, the assured is protected for the period of 13 months. There can be no question, therefore, that when McMaster signed the application for the insurance in question he understood that, if he paid the first annual premium in full, the policies that he would receive would continue in force for the period of 13 months from their date; that is, that the same could not be forfeited by a failure to pay a premium within that time. The testimony of Smith, the solicitor of the company, further shows that the understanding had with McMaster when the application was signed was that the first annual premiums were to be paid in full when the policies were delivered, and, in fact, the first premiums were so paid. Therefore, when McMaster signed the application, his understanding of the proposed contract of insurance, which he contemplated securing, was that the first annual premiums were to be paid in full when the policies

were delivered, and that these payments, when made, would secure him against a forfeiture on part of the company for a period of 13 months. The provision in the policy is that, "during the said month of grace, the unpaid premium, with interest as above, remains an indebtedness due the company, and, in the event of death during said month, this indebtedness will be deducted from the amount of the insurance." This clause clearly points to a month of grace not covered by the premium already paid, and fully justified McMaster in the assumption that, if he paid the first annual payment in full, he would be entitled to one year's protection, and also to one month of grace to be added thereto, or, in other words, to a period of 13 months, during which the policies could not be declared forfeited by the company. If there exists some question touching the meaning to be given to this clause, it must be solved against the company; and, furthermore, the evidence shows that the company, through its soliciting agent, construed the clause in question to mean that the payment of the first annual payment would protect the insured against a forfeiture for the period of 13 months, and used that construction as an inducement to secure the insurance from McMaster, and the company ought not to be permitted to now construe the clause in the policy in a manner different from that which it relied upon when soliciting the insurance.

The evidence in the case shows that the insurance was solicited, the application was signed, the first annual premiums were paid, and the policies were delivered, at Sioux City, Iowa, the place of residence of the insured, and therefore the relation of the solicitor, Smith, to the parties, is controlled by the statute of Iowa upon that subject. *Assurance Soc.*, v. *Clements*, 140 U. S., 226, 11

Sup. Ct., 822; *Indemnity Co.*, v. *Berry*, 1 C. C. A., 561, 50 Fed. 511. By the Acts of the 18th General Assembly of the State of Iowa (chapter 211, p. 209) it is declared that "any person who shall hereafter solicit insurance or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding." In *Cook* v. *Association*, 74 Iowa, 746, 35 N. W., 500, the Supreme Court ruled that the above section applied to all kinds of insurance companies, including those engaged in life insurance. Therefore, when the solicitor, Smith, represented to McMaster that by paying the one annual payment on the policies about to be issued he would secure a period of 13 months during which the policies could not be forfeited, by reason of the clause in the policies giving a full month of grace, Smith, as agent of the company, put a construction upon the clause which is now binding upon the company. The facts of this case bring it fully within the ruling of the Supreme Court of the United States in *Insurance Co.* v. *Chamberlain*, 132 U. S., 304, 10 Sup. Ct., 87. In that case it appeared that the application required the applicant to state whether he had any other insurance on his life. The fact was, he was a member of various co-operative associations, and by reason thereof he had insurance on his life to the amount of $12,000. The applicant stated the facts fairly to the soliciting agent of the company, who took the view that co-operative insurance of the kind held by the applicant was not insurance within the meaning of the question in the application, and therefore wrote "No" as the proper answer to the question. The Supreme Court held that, under the statute of Iowa, the solicitor was agent of the company, and that the company was estopped from

claiming that the insurance held by the applicant in co-operative companies was in fact insurance within the meaning of the application, or, in other words, held that the interpretation put upon the question by the soliciting agent when the insurance was applied for bound the company when suit was brought to recover upon the policy. Therefore, it is made clearly to appear that McMaster was induced to apply for and take the insurance upon his life in the defendant company upon the understanding that, if he paid the first annual premiums upon each policy, he would secure contracts of insurance which could not be forfeited within a period of 13 months. The first annual premiums were paid, the policies, bearing date December 18, 1893, were delivered, and the insured died within 13 months from the date of the policies; and the company refuses payment and denies liability on the ground that the second year's premiums had not been paid at the date fixed in the policy or within a month thereafter, and therefore the policies have been forfeited. The date fixed in the policies for the payment of the second and subsequent premiums is the 12th day of December, and it thus appears that the second premiums were made payable in advance of the termination of the first year for which the premiums were paid when the policies were delivered. If the theory contended for on behalf of the company is correct, it follows that by the device of making the second and subsequent payments due on the 12th day of December, instead of the 18th, the date of the policies, the insured and his estate are deprived of the benefit of the month's grace which McMaster was assured he would be entitled to, when he applied for the insurance. Furthermore, if this construction of the policy is sustained, it makes it possible for the company, after using the month's grace as an argument to secure insur-

ance, then to escape the obligation by the simple device of so writing the policies as to make the second payments come due a month in advance of the date of the policies. The argument on behalf of the company is that there was nothing said in the application with regard to the date of the second and subsequent payments, and therefore the company had the right to fix the date, and the insured, by receiving the policies without objection, and paying the first premium, agreed to the date named in the policies, and is bound thereby.

Assuming that at law the parties are bound by the date thus fixed for the second payment of the premiums, the question still remains whether, from the fact that the second and subsequent premiums are made payable on he 12th of December, it necessarily follows that the policies could be declared forfeited by the company until after the expiration of the 13 months from the date thereof. At law, the question would seem to turn upon the proposition whether McMaster, by paying the first annual premium in full, became entitled to a contract of insurance which could not be forfeited until after the expiration of 13 months, because, if that was the contract, then the court would be justified in so construing the clause with regard to the forfeiture for nonpayment of subsequent premiums as to hold that the same did not become applicable and in force until after the expiration of the 13 months period. There can be no question, under the facts of this case, that when McMaster signed the application for the insurance he understood, and the company, then represented by its soliciting agent, understood, that, if the officers of the company at the home office accepted the risk, by paying one year's premium in full McMaster would secure contracts of insurance which could not be

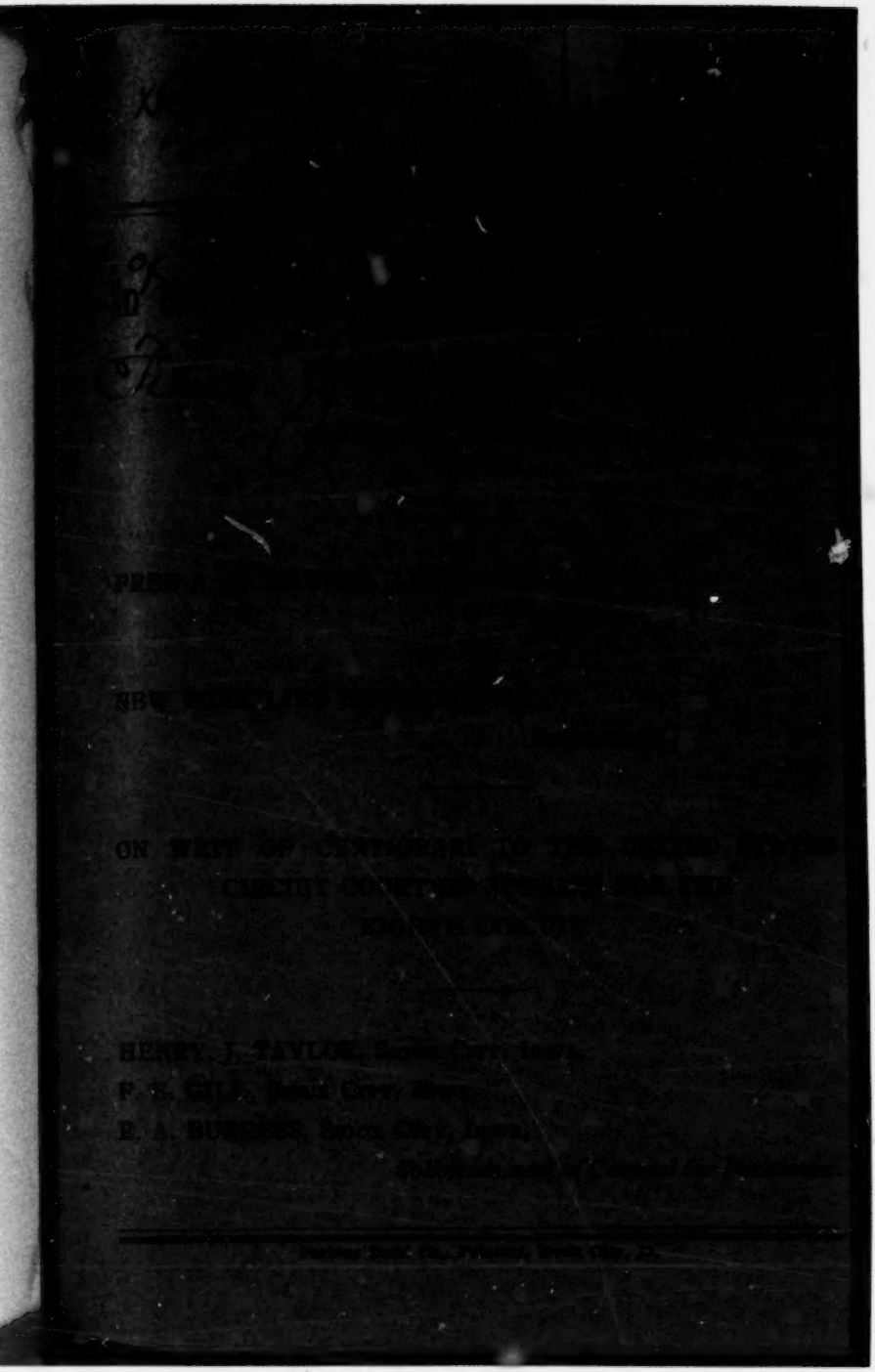
forfeited until after the expiration of 13 months. The company accepted the risk, and issued policies for the required amount, dating the same December 18th; and the defendant, in its answer, avers "that on or about the 25th day of December, 1893, the said policies were delivered to the said Frank E. McMaster, who received the same, and paid the first year's premiums thereon." If the policies had not antedated the time for the payment of the second and subsequent premiums, making the same payable in advance, there would be no question of the liability of the company, because, it being admitted that the first year's premiums were paid in full, then the insured became entitled to a month's grace; and the insured died within the month of grace, thus entitling the company to deduct from the face of the policy the amount of the second premium, with interest thereon. When the policies were delivered to McMaster upon payment of the first year's premiums, there were then created valid contracts of insurance upon the life of McMaster, not for one year, but continuing contracts extending over the life of the insured, which could not be forfeited for nonpayment of premiums, so as to deprive the insured of the protection thereof during any period of the time covered by the payments already made. Therefore, at law, the question is, for what period of time were the policies rendered nonforfeitable by the payment of the first year's premiums? It is admitted that the contracts of insurance did not take effect until December 26, 1893, when the first year's premiums were paid, and the policies were delivered to the insured. If these policies did not contain the clause allowing one month's grace, the payment of the premiums would certainly have prevented a forfeiture for one year from December 26, 1893. Unless a period of a month be added thereto, the insured is deprived of the benefit of the

period of grace which was promised him. If this period is allowed, then the policies were in force at the date of McMaster's death. Upon what theory or principle can the insured be rightfully deprived of the benefit of this period?

It cannot be questioned that if the company had followed the usual rule, and had made the time for the payment of the second and subsequent premiums to count from the date of the policies, there would be no doubt of the liability of the company. The policies are dated December 18, 1893. If the second and subsequent premiums had been made payable on December 18th in 1894 and subsequent years, then the month's grace would date from December 18th, and the policies would not be forfeited until after January 18th following. The defense of the company is rested on the fact that it made the second and subsequent premiums payable on December 12th in 1894 and subsequent years. It is not claimed that this date was agreed upon between McMaster and the company. There is no evidence showing that, when the policies were delivered, his attention was called to this date, or that he in fact knew that December 12th had been named in the policies as the time for the payment of the subsequent premiums. In the answer filed by defendant it is expressly averred that "no directions were ever given or request made by the deceased, or any agreement made, that the premiums should be made payable on any specified date." The evidence justifies the conclusion that the defendant company agreed with McMaster to insure his life, and to issue to him contracts of insurance to take effect when the first year's premiums thereon were paid, and to be nonforfeitable for a period of 13 months; that the company issued policies for the amounts agreed upon,

and delivered the same on December 26, 1893, receiving, at that time, payment of one year's premiums in full, and thereby became bound to pay the agreed sums, provided McMaster died while the policies were in force; that by the terms of the contract of insurance the policies could not be forfeited until 13 months had elapsed; that, it being admitted by the defendant that there was no agreement between McMaster and the company with regard to the time when the second and subsequent premiums should become payable, the company could not, by its own act in antedating time of payment of the subsequent premiums, deprive McMaster of the protection of the contracts of insurance during the period of 13 months from the date of the first payment. If it be true that the payment of the first year's premiums made the policies nonforfeitable for a period of 13 months, then at law the court is justified in holding that the forfeiture claimed by reason of the nonpayment of the second premiums could not be availed of by defendant until the period of 13 months had elapsed, and would not be a defense to a claim based upon the death of McMaster within the period of 13 months from the taking effect of the contracts of insurance. If, however, it should be held at law that the policies are so worded that they can be declared forfeited because the second premiums had not been paid on the 12th day of December, 1894, or within a month thereafter, then it is clear that the policies should be reformed so as to correspond to the real contract of the parties. As already stated, the evidence shows that it was the agreement of the parties that the policies were to take effect upon delivery, and that they were not to be delivered until the premiums were paid; and it also clearly appears from the evidence that McMaster expected to receive, and the company contracted to deliver, poli-

cies which would be nonforfeitable for a period of 13 months; and it now appears that the company, although it admits that there never was any agreement authorizing it to antedate the time for the payment of the second premium, of its own motion did so antedate the time for such payment, and claims that by so doing it has deprived McMaster of protection during the full period of 13 months, during which period it had previously agreed the policies should be in full force and nonforfeitable. Although, as herein indicated, the proper legal construction of the policies shows that they were in force when McMaster died, yet as the defendant company is insisting that the policies, as written, had then been forfeited by reason of the fact that the second premiums had been made payable on the 12th of December, it being admitted that this was done without the consent of the insured, and as it is clear that it was not the contract of the parties that the 13-months nonforfeitable period should begin to run on the 12th of December, 1894, there is ground upon which the complainant can rest in asking a decree of reformation, and such decree will therefore be granted in favor of complainant.



In the Supreme Court of the United States.

OCTOBER TERM, 1900.

NO. 199.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FRED A. McMASTER, ADMINISTRATOR,
Petitioner,

vs.

NEW YORK LIFE INSURANCE CO.,
Respondent.

STATEMENT OF THE CASE.

This is an action brought by the petitioner, Fred A. McMaster, as administrator of the estate of Frank E. McMaster, deceased, against the respondent, New York Life Insurance Company, upon five policies of insurance, all dated December 18, 1893, for $1,000 each, upon the life of the deceased. The assured died January 18, 1895. The policies were delivered and received under emphatic representations that they would and did contain provisions granting thirteen months of insurance for the first annual premium.

After the application was signed by the assured and delivered to the agent on December 12, 1893, at Sioux City, Iowa, the agent, without the knowledge or consent of the assured, wrote on its face these words: "*Please date policy same as application.*" It was this forged interpolation of the agent to further his own private interests that caused all the trouble (6th finding, pp. 32-3).

The company did not follow the secret direction of its agent, but dated the policies December 18, the date of their issue in New York, and made the annual premiums payable December 12, the date of the application. By oral agreement and by express provision of the application (par. 4, p. 12), which became a part of the policies, the policies were not to go into force or effect until after their delivery and the payment of the first annual premium (7th finding, pp. 53-4), which took place in Sioux City, Iowa, on December 26, 1893.

The respondent's answer alleges that the words, "please date policy same as application," constituted "a *request* that said five policies each should be issued, dated and take effect the same date as the application, namely, the 12th day of December, 1893, and said request was complied with, and the policies were so issued" (par. 2, p. 20). The application *as signed* by the assured did *not* contain such a "request," but did contain a provision diametrically *opposed* thereto (par. 4, p. 12), namely, "that any policy which may be issued under this application *shall not be in force* until the actual payment to and acceptance of the premium by said company or its authorized agent." The special findings (6 and 7, pp. 32-3) conclusively determine that the so-called "request" *was not in the application* when it was signed by the assured, but that after it had passed into the possession of the agent of the respondent, such agent, *without the knowledge or assent of the assured*, wrongfully interpolated such "request" into the application in order to secure an extra bonus or agent's commission for December, 1893, business. The home office acted

upon the application without the assured having had any knowledge of the "request," and it does not appear that he "ever knew that these words had been written into the application" (6th finding, p. 33). It is further conclusively determined by the findings that it was *not* agreed that the contract of insurance should go into effect December 12th, but on the contrary, as stated in the written application and under the oral agreement of the parties, the insurance was not to take effect until the payment of the premium and the delivery of the policies (7th finding, p. 33; par. 4, p. 12).

If the answer (par. 2, p. 20) purports to assert that McMaster was insured from and after the 12th day of December, 1893, then that allegation not only finds no support in the findings, but they conclusively determine the contrary, as there is nothing in either the policies or the application to warrant even the suggestion of insurance prior to the date of the policies, or as we contend (although it is immaterial in this case), prior to the payment of the premium and the delivery of the policies.

The respondent concedes the month of grace on all its policies (par. 2, p. 20), but contends that the so-called "request" permitted and actually directed the insertion of a provision in the policies by which the contract of insurance, so far as the same rested on the payment of the first premium, should terminate at the expiration of thirteen months from December 12th, 1893, instead of thirteen months from either the date of the policies, December 18, 1893, or as provided in the application (par. 4, p. 12), thirteen months from the date of the actual payment of the premium and the delivery of the policies, which was December 26, 1893 (9th finding, p. 37). In other words, the agreed thirteen months of insurance is alleged to have been reduced by the so called "request" from thirteen months for the first premium to exactly twelve months and seventeen days, which reduction is admitted to have been solely caused by the forged interpolation.

To induce the taking of the insurance, the respondent's agent pressed upon McMaster certain provisions *adopted* by the company and set forth in printed circulars issued by the company, and in provisions printed on the back of its policies under the heading, "Benefits and Provisions referred to in this Policy," reciting that after the policies had been in force three months a grace of one month would be allowed in the payment of subsequent premiums (3d finding, p. 32).

The application was signed December 12, 1893, in reliance upon such provisions, emphasized by oral representations, and in the belief that if the assured accepted policies of insurance upon his life from the respondent, and paid the premiums thereon annually, the company could not assert the right of forfeiture until *thirteen months* had elapsed after the payment of the last annual premium (4th finding, p. 32).

By express oral agreement when the application was signed, which agreement was confirmed in the written application (p. 12, div. 4), the first year's premium was not to be paid until the delivery of the policies in Sioux City, Iowa, and the contract of insurance was *not* to take effect until the policies were there delivered (7th finding, p. 33). The policies were not in fact dated the same as the application (which was dated December 12), but were dated December 18, and the second annual premium instead of being made payable on December 18 (which was the date of the policies), or even one year after the date of delivery (December 26), was *dated back* to December 12, the date of the application.

The five policies, enclosed in one envelope, on December 26, 1893, were taken by the agent of the respondent to the office of McMaster in Sioux City, Iowa, who there and then asked the agent if the policies were written *as had been represented*, and if they would insure him for the period of *thirteen months* for the first premium, to which the agent replied that they did so insure him, and thereupon McMaster paid the agent the full first annual premium, and without reading the

policies received them, and placed them away. At the inception of their interview the agent and the assured were interrupted by the entrance of a client, and the assured thereupon desisted from an examination of the policies, and accepted them on the representations of the agent as to their contents as aforesaid (p. 105). The agent of the company did not in any way attempt to prevent McMaster from reading the policies, and he had full opportunity to read them, but in fact did not read them, *and accepted them on the statements so made by the agent* (9th finding, pp. 33-4).

In December, 1894, McMaster was examined for insurance in the Union Central Life Insurance Company under the agreement that that company should not issue the new policies until in January, 1895, and *after* the expiration of his insurance in the respondent company, only *a part* of whose policies the assured had decided to continue in force, and on January 15, 1895 (three days before his death), McMaster instructed the agent of the Union Central Company to continue to hold his new policies in that company for the reason that his insurance in the respondent company *had not yet expired*. McMaster believed that his policies in the respondent company would continue in force for at least the period of *thirteen months from their date*, and relying upon that belief, he was delaying the consummation of the proposed insurance in the Union Central Company as late as January 15, 1895 (findings 12, 13, 14, pp. 34-5). He died January 18, 1895, without having paid the second premium on the policies in controversy, nor had his policies in the Union Central Company then been delivered (15th and 16th findings, p. 35).

A jury was waived and the case tried to the Court, the Honorable O. P. Shiras presiding. The Court based his judgment on special findings, which are brief, and are found on pages 31-5 of the record. The form of the policy containing the form of the application, is annexed to the petition, is made a part of the findings, and is set out on pp. 6 to 14 inclusive.

The opinion of Judge Shiras was with the petitioner, but he rendered judgment in favor of the respondent, because, while not bound thereby, he yet felt constrained to follow an opinion of the Circuit Court of Appeals given in a former equity suit between the same parties to reform the policies in controversy. Judge Shiras (p. 52) invited an appeal from his own judgment in this case in these words:

"If free to give judgment according to my own view of the questions involved, I should find for the plaintiff; but, as already stated, the Circuit Court of Appeals held in the equity case (87 Fed. Rep., 63) that there could be no recovery on the policies at law or in equity, and I deem it my duty to follow this ruling, leaving it to the plaintiff to carry this action at law before the Court for its further consideration; and, therefore, while my opinion is with the plaintiff, the judgment must be for the defendant."

ASSIGNMENT OF ERRORS.

The errors assigned are four in number, but only one in substance, and are set out on page 61 of the record, and need be repeated here only in substance. The petitioner assigns error in that the special findings of fact are insufficient to entitle the respondent to judgment, and do not support the same, and that under the findings of fact, as a matter of law, judgment should have been rendered in favor of the petitioner and against the respondent for the amount found to be due on the policies.

BRIEF OF THE ARGUMENT.

I.

THUS FAR TWO JUDGES HAVE FILED SEPARATE OPINIONS IN FAVOR OF, AND TWO JUDGES SEPARATE OPINIONS AGAINST A RECOVERY.

There are as many written opinions in this case as there are judges who have heard it. Judges Shiras and Caldwell hold that the petitioner should recover. Judges Sanborn and Thayer hold that he should not.

The opinion of the trial court, Judge Shiras, is found in the record, pp. 35-52.

The opinion of the same judge in the former equity case is annexed as an appendix to petitioner's brief in this Court in support of his petition for the writ of certiorari, and is worthy of careful consideration in connection with this case.

The dissenting opinion of Judge Caldwell, sustaining a recovery, is found on pp. 84-101 of the record.

The opinion of Judge Sanborn, denying a recovery, is found on pp. 71-83 of the record.

The opinion of Judge Thayer, also denying a recovery, is found on pp. 83-4 of the record.

We assume that this Court will read all of these opinions.

The separate opinion of each of these distinguished jurists bears evidence of careful study and exhaustive research, as well as of strong personal convictions on the merits of the controversy. While Judges Shiras and Caldwell substantially agree, Judges Thayer and Sanborn concur in the result reached rather than in the reasoning leading thereto. By this reference the petitioner makes the opinions of Judges Shiras and Caldwell a part of his brief, and asks consideration thereof as if restated herein.

This case has gotten beyond the counsel for the respective parties. It has developed into a struggle for supremacy as between the far-reaching legal principles championed by the judges arrayed on either side of the controversy. It is now the Court's case. The number of policyholders and the amount paid in premiums is now so enormous that life insurance companies have become great investment companies into which people are annually pouring millions upon millions for the future protection of their dependent and loved ones. A strict accountability has become a necessity as a matter of wholesome public policy. No fraud should be allowed to rob the beneficiaries of the purchased protection.

We ask indulgence in presenting further argument here, not with the expectation of adding anything new to the exhaustive research and argument of the judges who have already considered the case, but with the hope that a review of their several opinions may in some degree assist this Court in its consideration of a case that is important far beyond anything that is merely personal to this petitioner.

II.

IN THE CIRCUIT COURT OF APPEALS, THE CASE TURNED ON THE PAROL-EVIDENCE RULE. IT SHOULD HAVE TURNED ON THE DOCTRINE OF ESTOPPEL.

Judge Sanborn admits that the policies are not responsive to the agreements for insurance, but constitute what he terms "*a counter-proposition*" upon the one controlling inducement that secured the business for the company, to-wit: thirteen full months of insurance for the first annual premium.

It is concluded by the special findings that the assured was to receive a policy the terms of which would grant him thirteen full months of insurance for the first annual premium. Judge Sanborn's alleged "counter-proposition" reduces this time to twelve months and seventeen days, thus depriving the assured of nearly half of the promised extra month of grace,

which was so successfully heralded to attract business by the agent, and "by circulars issued by the company" (3d finding, p. 32), and by the provisions printed on the back of the policies. This "counter-proposition" was delivered to the assured *without advising or warning him that the policies involved a "counter-proposition"* and with an emphasized denial thereof.

More than this, in response to the comprehensive inquiries of the assured, put to the agent at the moment of the delivery of the policies and the payment of the first premium, the company represented that the terms of the policies were just as had been agreed—that they insured him for the full period of thirteen months for the first annual premium—and the assured, relying upon the representations so made as to existing provisions contained in the completed policies, accepted them, placed them away unread before the eyes of the agent, to whom he then paid "the full first annual premium."

It is urged that such conduct as is disclosed by the special findings estops the company from asserting the provisions of the policies, if any, that would deprive the assured of thirteen full months' insurance from the agreed time, and as stated in the application, to-wit: thirteen months' insurance from December 26, 1893, the date of the delivery of the policies and the payment of the premium, or at least from December 18, 1893, the date of the policies. The assured bought and paid for that much insurance in advance. The statements of the agent in reference to the existing terms of the policies were known to him to be false, and were relied on by the assured to his damage. That the guilty party may not render his fraud effectual, the parol-evidence rule must yield to the rule of equitable estoppel.

Insurance Co. v. *Wilkinson*, 13 Wall., 222
Equitable Ins. Co. v. *Hearne*, 20 Wall., 494.

The party responsible for the fraud or other vice inherent in a contract estops himself from setting it up, and *parol evidence is admissible to establish and furnish the basis for the es-*

toppel. Under the rule of estoppel the statement, "please date policy same as application," is not the direction of the assured but of the company itself, and the company must bear all the consequences naturally, reasonably or actually flowing from its conduct.

Insurance Co. v. *Chamberlain*, 132 U. S., 304, 311.
Insurance Co. v. *Mahone*, 21 Wall., 152, 156.
Insurance Co. v. *Wilkinson*, 13 Wall., 222.
New Jersey Ins. Co. v. *Baker*, 94 U. S., 610.
North Am. Ins. Co. v. *Throop*, 22 Mich., 146.
Patten v. *Ins. Co.*, 40 N. H., 375, 380.
McMaster v. *Insurance Co.*, 78 Fed. Rep., 86.
Marston v. *Insurance Co.*, 89 Me., 266.

The company by its conduct estopped itself from insisting that the policies delivered gave less than thirteen full months of insurance for the first annual premium, because to permit that would result in the perpetration of a legal fraud. This does not involve any inconsistency between the parol evidence rule and the doctrine of equitable estoppel; but if it does, then the former must give way to the latter. The parol evidence rule is itself not a rule of evidence. It is rather an inhibition against evidence, for various reasons, chief among which is that solemn writings are more trustworthy than memory, all in the interest of ascertaining and enforcing justice and honesty.

The parol-evidence rule, however, is not the only controlling rule that Courts have recognized. The doctrine of estoppel is, perhaps, the greatest legal principle of modern times in its elasticity and efficiency to prevent the perpetration of wrong. If a writing otherwise dominated by the parol-evidence rule has been procured through fraud, deceit, overreaching, or in any way that puts fair play and honest dealing to shame as a matter of intention or ultimate result, then the sanctity and force of the written instrument is removed, and the party claiming under it is disabled from so using it as to impose a loss or hardship upon the party overreached or to

consummate a fraud. The doctrine of estoppel then steps in with a voice of supreme authority and declares that the written instrument has forfeited the right to invoke the parol-evidence rule, because procured through mistake, fraud or deceit—things that cannot be tolerated in a court of justice. When these rules clash Courts let that one prevail which has its foundation in good conscience.

To put it another way, a writing can never prevail under the parol-evidence rule unless it is a writing of good, equitable reputation or character. If it is shown to be a fraud and a cheat, its right to command must cease, and its voice must be silenced by the supreme doctrine of equitable estoppel, which brooks no opposition to its purpose of rendering fraud ineffectual. That is the position of Judges Caldwell and Shiras.

If the written agreements in controversy do not give thirteen full months of insurance for the first annual premium then they have so bad a character that the doctrine of equitable estoppel becomes controlling, and must abrogate the parol-evidence rule.

The month of grace is a conceded fact (pp. 9 and 20), and that in connection with the application, constitutes an agreement for thirteen months' insurance from the delivery of the policies for the first annual premium (findings 3, 4, 7, 8, 9, 12, 13 and 14, pp. 32-35).

Conceding for the purpose of this argument that the policies do not grant thirteen months of insurance, the agent knew this. The company admits that the "request" contained in the forged interlineation was material in determining how the policies should be written up, and insists that it complied therewith (p. 20). The delivery of such a "counter-proposition" without advising the assured that a counter-proposition was involved would of itself have amounted to fraudulent concealment; but that is not the case. Here the assured was prevented from discovering the "counter-proposition" by the agent's positive statement of the provisions of the policies.

He trusted to the honesty of the company by asking whether the provisions of the policies were as represented, and the company responded, "yes." To make sure that the "nice provision" had not been overlooked, he asked if they (the policies) insured him for the period of thirteen months, to which the agent replied that they did so insure him, and, thereupon, relying upon said representations of the company as to *existing facts* concerning the *completed* policies, he accepted them, placed them away *unread* before the eyes of the agent, who then and there reached out his hand and received "the full first annual premium, or the sum of $21 on each policy" (9th finding, pp. 33-4), and went on his way rejoicing in the security of his "bonus" (6th finding, pp. 32-3).

The record shows more than "a counter-proposition." It shows a contemptible fraud, prompted by the avarice of the agent, the fruits of which the company strives to secure under the technical parol-evidence rule, and the petitioner, as his only resource, asks this Court to prevent iniquity by enforcing an estoppel in pais.

III.

ABOVE THE RULE OF PAROL EVIDENCE AGAINST VARYING OR CONTRADICTING THE TERMS OF THE WRITTEN CONTRACT IS THE DOCTRINE THAT ONE CANNOT USE PROVISIONS PROCURED THROUGH MISTAKE, FRAUD OR DECEIT TO PERPETUATE THE SAME. THE ASSURED NEVER ASSENTED TO THIS UNKNOWN, UNSUSPECTED, UNDISCLOSED AND CONCEALED "COUNTER-PROPOSITION."

The following cases sustain this proposition:

Union Ins. Co. v. *Wilkinson*, 13 Wall., 222, 236.

Continental Ins. Co. v. *Chamberlain*, 130 U. S., 304.

In *Insurance Company* v. *Mahone*, 21 Wall., 152, the application was read over to the assured and voluntarily signed by him, nevertheless parol evidence was received.

In *Insurance Company* v. *Olmstead*, 21 Mich., 251, Judge Cooley said:

"When an agent, who at the time and place is the sole representative of the principal, assumes to know what information the principal requires, and after being furnished with all the facts, drafts a paper which he declares satisfactory, induces the other party to sign it, receives and retains the premium moneys, and then delivers a contract which the other party is led to believe, and *has a right to believe*, gives him the indemnity for which he paid his money, we do not think the insurer can be heard in repudiation of the indemnity, on the ground of his agent's unskillfulness, carelessness or fraud. If this can be done it is easy to see that the community is at the mercy of these insurance agents, who will have little difficulty in a large proportion of the cases in giving a worthless policy for the money they receive."

The representations of the agent do not constitute a legal conclusion, for the parties were not discussing language known to each. The inquiry of the assured was directed to the point whether or not the policy contained the promised thirteen months provision, and the parties never considered any specific language essential to form the basis for a legal conclusion or personal opinion.

It is well known that matters are thoroughly thrashed out at the time of the application, and that the policy itself is received as a matter of course, the assured resting confidently in the belief that the policy contains provisions responsive to the settled understanding of the parties as represented by the formal application.

If the policies delivered contain a provision permitting a forfeiture at the end of only twelve months and seventeen days of insurance for the first annual premium, then parol evidence is admissible to exclude that provision and defeat so premature a forfeiture because it violates the admitted and concluded agreement of the parties, and ought not to have been inserted, and is not the contract of the parties in that respect.

The case of *Kausal* v. *Ins. Co.*, 31 Minn., 21 (cited by this Court in 177 U. S., 273), is interesting. Judge Mitchell therein cites the cases of *Mahone*, *Wilkinson* and others, and shows what the established law is, and then says:

"After the Courts had generally established this doctrine, many of the insurance companies, in order to obviate it, adopted the ingenious device of inserting a provision *in the policy* that the application, by whomsoever made, whether by the agent of the company or any other person, shall be deemed the act of the insured and not of the insurer,"

and meets the "ingenious device" by the statement that "if corporations are astute in contriving such provisions, Courts will take care that they shall not be used as instruments of fraud or injustice," and holds that the provision thus injected into the policy was not a part of the instrument making up the contract, and permitted a recovery just as though that provision had not been written into the policy.

In *Insurance Company* v. *Baker*, 94 U. S., 610, the answer in the application was written by the company's agent, who "undertook to construe and interpret the answers of the applicant," and the Court held that "the evidence objected to was admissible to show that the statement was not that of the applicant, *although signed by her*. The statement was one prepared by the company, for which it was responsible, and it cannot be set up to defeat its policy."

In *North American Ins. Co.* v. *Throop*, 22 Mich., 146, in speaking of the admission of parol evidence in this class of cases, Judge Cooley said:

"We think evidence of these facts was competent. Its purpose was, not to vary or contradict the contract of the parties, but to preclude the party who had framed it from relying upon incorrect recitals to defeat it, when he, himself, had drafted those recitals, and was morally responsible for their truthfulness."

It is clearly established by the findings that the insurance in the respondent company was induced by its alleged superior provision for *thirteen months' insurance for the first annual premium*. If the policy by its terms grants, as Judge Sanborn says, under the "counter-proposition" only twelve months and seventeen days' insurance, instead of thirteen months' insurance, it remains true that this difference of fourteen days was not a

fact that would have deterred the company from accepting the risk. Indeed, its willingness to grant thirteen full months of insurance was heralded by its agent, by its printed circulars, and by its printed indorsements, as a superiority of its policies over those of other competing companies.

This is not a case where a statement falsifies a fact in any way conditioning the insurance, and which if stated truthfully would have caused a refusal of the risk. There was no concealment, and no occasion for concealment, for the point in controversy would not have influenced the respondent in accepting or rejecting the insurance. The assured firmly believed that the policies would remain in force for thirteen months from at least their date, and acted solely upon that belief in accepting the policies and in postponing the taking out of other insurance, even as late as January 15, 1895 (findings 12, 13, 14, 16, pp. 34-5). He was led to believe that he had thirteen months' insurance by the representations made to induce the taking thereof, by the printed circulars of the company, and by the application itself, and he accepted the policies in reliance thereon (findings 3 and 4, p. 32). In spite of the express finding, and in spite of the express provision in the application, fixing the time at which the contract of insurance was to take effect, the respondent now contends by its answer that the contract of insurance took effect from the date of the application (par. 2, p. 20). This, however, was not the agreement, and the findings are to the contrary. The application itself (par. 4, p. 12) fixes the time when the contract of insurance would commence, and the answer (par. 2, p. 20) admits the granting of a month of grace on all the policies of the respondent in addition to the full year. Moreover, in delivering the policies, the respondent represented that they contained provisions granting the agreed thirteen months' insurance, and upon that representation the respondent received, and still retains, the full first annual premium, knowing that the assured accepted the policies unread relying thereon, and relying upon the further fact that no provision could rightfully be incorporated

into the policies violative of this paramount agreement of the parties inducing the insurance.

If the words "please date policy same as application" had not been interpolated into the application, the annual premiums would certainly not have been made payable earlier than the date of the policies, not only because that was the agreement of the parties, but because the usual custom of the company would not have permitted the insertion of an earlier date than that, and certainly not in view of paragraph 4 (p. 12) of the application making express provision against insurance pending negotiations, or pending the period of time between the making of the application and the issuing and delivery of the policies. It is, therefore, absolutely certain that the policies in controversy would have permitted a recovery under the facts of this case, if the words "please date policy same as application" had not been inserted in the application. It is equally clear that these words, "please date policy same as application," were wrongfully interpolated by the agent without the knowledge or consent of the assured, and for the express purpose of securing for himself an extra bonus (6th finding, pp. 32-3). And it is equally certain that the respondent was very willing to grant thirteen months of insurance for the first premium.

It is conceded by Judge Sanborn that the policies violate the original agreement, and instead of granting thirteen months' insurance, grant insurance for only twelve months and *seventeen days*. Judge Sanborn calls this the "counter-proposition" contained in the policies.

It is admitted by the respondent's answer (par. 2, p. 20) that the date, December 12th, on the face of the policies, for the payment of the annual premium, was there written solely because of this so called "request," or forged interpolation, "please date policy same as application," and under the findings the so called "counter-proposition" was not only never brought to the attention of the assured, but was most skillfully concealed from him under positive representations, made in

response to exacting inquiries, that the policies contained the provision for thirteen months' insurance.

Judge Sanborn cites the case of *Kausal* v. *Ins Co.*, 31 Minn., 17, 21, to sustain his position; but we think it sustains the position of the petitioner. In that case the clause that the agent procuring the insurance was the agreed agent of the insured, was transferred from the application, where it had been so frequently inserted and rendered unavailable under repeated decisions, to the policy itself, and the Court permitted a recovery just as though the unauthorized provision had not been inserted *in the policy* at all, because it was wrongfully inserted therein, and was not the agreement of the parties.

The case in controversy would have been the same, in substance, if the agent had wrongfully, and without the knowledge or consent of the assured, inserted in the application, instead of the words, "please date policy same as application," the words: "the contract of insurance issued hereunder shall be in force for the first annual premium not to exceed twelve months and seventeen days," and the company had copied into the policy this exact provision. It seems clear to us that, under the *Kausal* and similar cases, in that event the company could not have defeated the petitioner's cause of action, because of such a forged interlineation in the application, for such a provision for only twelve months and seventeen days' insurance instead of thirteen months' insurance would not represent the agreement of the parties. As to such a clause, the application would not be the instrument that was signed. Nor should the situation be changed by carrying over such a forged interlineation in the application into the policy itself, for it would still remain true that the clause reducing the insurance from thirteen months to twelve months and seventeen days would not be responsive to the genuine application, and would not be the agreement of the parties, would not be such a clause as the company would *have a right* to insert in the policy, because never brought to the attention of the assured or consented to by him. To further apply the

hypothesis to the facts of this case, the assured would pay his premium relying on the belief that the policy contained no such clause, enforced by the affirmative representations of the company that it was not tendering a counter-proposition, and by its active and affirmative statements and representations actually inducing the assured to place his policy away unread. Such representations would not amount to a legal conclusion, but would be representations as to an existing fact—an agreed provision in the policy itself. The parties would not be considering the legal effect of known language, as no language would be under consideration, but only the existence in the policy of a provision for thirteen months' insurance.

Phoenix Ins. Co. v. *Allen*, 109 Ind., 272.
Plumb v. *Insurance Co.*, 18 N. Y., 392.
Howe v. *Provident Soc.*, 34 N. E. R., 830, 1–2.
Insurance Company v. *Leon*, 37 N. E. R., 584.
Sullivan v. *Insurance Company*, 34 Kan., 170.
Kausal v. *Ins. Co.*, 31 Minn., 21, approved 177 U. S., 260.

Parol evidence is certainly admissible to show that the present forfeiture provision is not the agreement of the parties; to show that as to this their minds never met. *But the contract for insurance nevertheless remains valid. The counterfeit forfeiture provision which resulted from the forged interpolation alone falls.* The petitioner does not ask the Court to make a new contract, but only to enforce the genuine one by the application of the doctrine of estoppel. A contract of insurance was actually put into force by the parties. This is conceded by everybody. The only controversy is as to when the admitted insurance contract should end. *The application does not say that the policies shall contain a forfeiture clause*, without which they would continue for life. Courts do not like forfeitures very well. They must be clearly made out. The one sought to be enforced was never agreed to by McMaster. Under provisions that did not allow the policies to go into force before delivery, the company followed no custom in making the annual premium date *earlier* than the date of the poli-

cies. Its conduct was unusual, extraordinary, never done before—bad faith—and ought not to bind. It violated custom, good-faith dealing, and the plain terms of the application. The assured was lulled and lied into a failure to read the policies. He paid his money on the faith of thirteen months' insurance. There was bad faith on the part of the agent or the company, or both. The assured was innocent, honest and truthful. He made sure that the signed application was all right. The rest was done by the company's agent and by the company itself. The assured was not permitted to write his own policy. He did not sign it as he did the application. The company relegates to itself the care of the formally signed application and the writing of the policy. It assumes the duty of making the policy issued conform to the terms of the formal application. If there is a forged interpolation by the agent in work imposed on him by the company and in connection with which the assured owes no duty, the company should stand the loss and recover from its dishonest agent. Respondent invited the assured to trust *its* agent. Should McMaster's family lose indemnity because he did? The response given by the company to the "request" makes it the real wrong-doer. By accepting and retaining the benefits of the agent's act the company ratifies the entire transaction and cannot escape the consequences thereof. Insurance for thirteen full months would have been gladly accorded to McMaster *at the same price.*

To ask or agree upon thirteen months was no fraud on the respondent. This was the very basis on which it pushed and solicited insurance. It took and keeps the full price. Only the assured is wronged because the plain duty of writing a policy to conform to the genuine application was violated. That duty the company assumed. Its failure to perform that duty can be profitable only to itself. The duty to read the policy is not the same in degree as the duty to read the application. The fact that the assured must sign the application shows that the company relies on him to get that right. But the assured, having done this, may confidently rely on the

He did not combine with the agent to impose on the company.

company to write the policy in conformity with the application. If the assured performs his duty and the agent takes advantage of the forwarding duty imposed on him *by the company as its agent*, where should the loss fall?

IV.

EVEN IF IT SHOULD BE GRANTED THAT IT WAS McMASTER'S DUTY TO READ THE POLICIES, STILL HIS NEGLECT TO DO SO CAN BIND HIM ONLY TO WHAT THE COMPANY HAD A RIGHT TO INSERT THEREIN.

This statement is too favorable to the respondent, because the omission of the asssured to read the policies can hardly be called neligence when that omission was procured by his known reliance on positive misrepresentations of existing facts by the respondent at the moment of the delivery of the policies, and the receipt of the premium therefor. Bad faith is worse than negligence.

This Court has said in *Insurance Company* v. *Hearne*, 20 Wall., 420, that the assured "had a right to assume that the policy would correctly conform to the agreements thus made and *to rest confidently in that belief*."

In *Knights of Pythias* v. *Withers*, 177 U. S., 260, this Court approved the following language:

"The Court might have gone further and designated it as a dishonest condition. It was the assertion of a falsehood, and an attempt to put that falsehood into the mouth of the assured. It formed no part of the contract of insurance. That contract consists of the application and the policy issued in pursuance thereof. In point of fact the assured does not see the policy until after it is executed and delivered to him. In many instances it is laid away by him and never read, especially as to the elaborate conditions in fine print. *Grant that it is his duty to read it, his neglect to do so can bind him only for what the company had a right to insert therein.* He was not

bound to suppose that the company would falsely assert, either by direct language in the policy or by reference to a by-law, that a man was his agent who had never been his agent, but who was, on the contrary, the agent of the company. Notwithstanding this was a mutual company, the assured did not become a member thereof until after the insurance was effected. Hence, a by-law of the company of which he had no knowledge, and by which he was not bound, could not affect him in matters occurring before the granting of the policy. * * * And even a by-law of a mutual company which declares that black is white does not necessarily make it so. Similar cases are those of *Eilenberger* v. *Protective Mut. F. Ins. Co.*, 89 Pa., 464; *Susquehana Mut. F. Ins. Co.* v. *Cusick*, 109 Pa., 157; and *Kister* v. *Lebanon Mut. Ins. Co.*, 128 Pa., 553."

Inasmuch as this Court has thus approved the case of *Kister* v. *Insurance Company*, 128 Pa., 553, brief quotations therefrom may be made:

"We cannot say that the law, in anticipation of a fraud upon the part of a company, imposed any absolute duty upon Kister to read his policy when he received it, although it would certainly have been an act of prudence on his part to do so. *Howard F. Ins. Co.* v. *Brunner*, 23 Pa., 50; *Union Mut. L. Ins. Co.* v. *Wilkinson*, 13 Wall., 222. One thing is certain, however, the company cannot repudiate the fraud of its agent, and thus escape the obligations of a contract consummated thereby, merely because Kister accepted in good faith the act of the agent without examination."

We refrain from citing the decisions of the several State Courts upon this proposition, more especially because many of them are cited in the opinion of Judge Caldwell. However, as this case comes from Iowa, we will cite decisions by that Court.

In *Fitchner* v. *Fidelity Mut. F. Asse.*, 103 Iowa, 276, 279, the Court said:

"Doughty was the agent of the company, and acted in that capacity in preparing the application. The insured ordinarily rely upon the agent to properly set out the facts in the application, and Laub did as men usually do, in assuming that the defendant's agent had done his duty. *Stone* v. *Insurance Co.*,

68 Iowa, 737; *McComb* v. *Insurance Co.*, 83 Iowa, 247. The mere failure of the assured to read his application, or the copy of it on the policy, does not establish negligence. *Bennett* v. *Insurance Co.*, 70 Iowa, 600; *Hagan* v. *Insurance Co.*, 81 Iowa, 321; *Donnelly* v. *Insurance Co.*, 47 Iowa, 353. Nor is mere omission to read the policy negligence. *Barnes* v. *Insurance Co.*, 75 Iowa, 11; *Jamison* v. *Insurance Co.*, 85 Iowa, 229; *Boetcher* v. *Insurance Co.*, supra. Laub had no reason to suppose the policy and application were drawn differently than understood."

Dyer v. *Ins. Co.*, 82 N. W. R., 82 (Iowa).

Hartford Steam Boiler Inspection & Ins. Co. v. *Cartier*, 89 Mich., 41, 48, was a case of a "counter-proposition," or rather a new provision, which was held not binding because the insured's attention was not called to the clause. The concealment was held to be fraudulent, although a silent concealment, while the "counter-proposition" in the case at bar was not made in silence, but under emphatic representations that only the genuine proposition was involved. This *Cartier* case is interesting and pertinent. The following quotation from it is approved in a note to May on Insurance, 4th ed., sec. 200:

"Conditions and restrictions in insurance policies, to be binding upon the insured, must be inserted without fraud, misrepresentation or concealment. In order to charge the insured with the duty of an examination of his policy with reference to new matter introduced into it, he must be left free to discharge that duty unaffected by the company's representations, and not be led to neglect it by the conduct of the company itself. The company cannot be allowed to evade his questions, mislead him, suppress the truth, and lull him to sleep regarding new restrictions which it has injected into the policy, and thereafter charge him with constructive knowledge of those restrictions. The company obtained this very policy by inducing defendant to cancel a policy in the American; and, presumably to prevent the American from doing just what plaintiff was then doing. It introduces into the new policy a clause taking away a privilege which defendant had exercised under the old policies. Not only was defendant's attention not called to this change, but, when asked with

reference to an exercise of the right of cancellation, plaintiff's agent neglects a plain duty, conceals the fact of change, and misleads and deceives the defendant. The question here is not as to the effect of a naked acceptance of a policy without examination, but as to whether, in the absence of actual notice a party can be bound by a new restriction in a policy concerning the existence of which he has been lulled to sleep, and actually misled and deceived. In *Gristock* v. *Insurance Co.*, 49 N. W. Rep., 634, Justice Grant, speaking for this Court, said: 'Plaintiff had a right to rely upon the assumption that his policy would be in accordance with the terms of his oral application. If the defendant desired to make it anything different he should, in order to make it binding upon plaintiff, have called his attention to those clauses which differed from the oral application.' "

The mutual intention of the parties that a full month of grace should be added to the year's insurance is admitted in the policies and findings and pleadings (pp. 9, 32, 3d and 4th findings; par. 2, p. 20).

The application fixed the time when the year's insurance should begin as of the date of the "actual payment to, and the acceptance of the premium by, said company" (par. 4, p. 12), and the special findings further confirm the agreement of the parties in this regard (7th finding, p. 33).

The assured, therefore, in the language of this Court in the *Hearne* case, *supra*, in the absence of notification, "had a right to assume that the policy would correctly conform to the agreement thus made, and to rest confidently in that belief," and as further stated in the *Withers* case, *supra* (177 U. S., 260), the assured could at most be bound for "*only what the company had a right to insert therein.*"

V.

IT IS UNCONTRADICTED THAT THE GRIEF OF THIS CONTROVERSY WAS WROUGHT, WITHOUT THE KNOWLEDGE OR CONSENT OF THE ASSURED, BY THE WRONGFUL INTERPOLATION IN THE APPLICATION, BY THE AGENT OF THE INSURANCE COMPANY, OF THE WORDS, "PLEASE DATE POLICY SAME AS APPLICATION," (6th FINDING, p. 32). THIS WAS DONE "BY THE AGENT IN ORDER TO SECURE TO THE AGENT A BONUS WHICH THE COMPANY ALLOWED TO AGENTS FOR BUSINESS SECURED DURING THE MONTH OF DECEMBER, 1893."

In delivering the policies in question, we assert that the company is chargeable with a positive legal fraud.

The company, upon reading the fraudulent interpolation, disregarded the agreement contained in the application (p. 12, par. 4), to the effect that the insurance should not be in force until the delivery of the policies and the payment of the premium, and while it dated the policies December 18th, the day the risk was advised in New York, it made the second annual premium payable December 12th, the date of the application, all for the secret purpose of increasing the agent's bonus (6th finding, p. 32).

Judge Sanborn, p. 79, admits that the policies were not responsive to the application. He says:

"The applications were nothing but a proposition to take insurance. They were not contracts, but mere requests for, or a proposition to take, policies. The company was not bound to grant these requests or to accept the proposition. It had the right to reject them *in toto* or to reject some parts of them and to make a *counter-proposition*. It took the latter course. *It rejected some parts of the applicant's proposition and made a counter-proposition.*"

The policies by their terms expressly made the application a part of the contract (p. 6).

The company could not deliver a "counter-proposition" without notice to the insured that a counter-proposition was involved. It has agreed to deliver a specific contract, and only

with the knowledge and consent of the assured could it deliver any other and take and keep the premium. The assured is bound only by such a contract as the company had a right to deliver, and the company is estopped from asserting that the effect of the contract delivered is otherwise than would be the case if it had delivered the genuine proposition which the assured had a right to expect, and which he justly believed he was receiving. The counterfeit proposition was not delivered by reason of any act or request of the assured, but solely by reason of the forged interpolation and subsequent conduct of the agent. If the fraudulent request of the agent had not been made, or had been disregarded and the policies regularly issued, then this controversy could never have arisen, and the rule of estoppel will not now tolerate any defense that would result in working a forfeiture so procured, or in securing to the company any advantage from the fraud.

Thirteen full months of insurance for the first premium, as represented by the company in its printed circulars and by its agent, was the dominant and controlling inducement to the insurance contract. It was, therefore, dishonest and fraudulent to deliver a counter-proposition which eliminated the sole inducement to the contract, without advising the assured that the policies contained a "counter-proposition." It was doubly dishonest for the company, through its agent, to stand up and in the face of the assured, in response to his inquiries, deny, as strong as language is capable of putting it, that the policies contained any counter-proposition, and assert to the contrary that they contained provisions for thirteen months of insurance for the first premium, and were in all their terms as had been represented, intending and knowing that such representations of existing facts at the moment of delivery, in the midst of an interruption (p. 105), induced the immediate payment of the full first annual premium, put the assured off his guard, and induced him to put the policies away unread.

But the contention of the respondent itself, while equally untenable, differs from that of Judge Sanborn.

Paragraph 2 of the company's amended and substituted answer (p. 20) alleges that the words in the application, "please date policy same as application," amount to a "request that said five policies each should be *issued, dated and take effect* the same date as the application, namely, the 12th day of December, 1893, and said request was complied with, and the policies were so issued."

This is the company's deliberate understanding and interpretation of the meaning and effect to be given to those words. It admits that the fraud of the agent was material in determining how the policies should be written up. At any rate, its present position is fixed by its answer as to the natural and actual effect to be given to the interpolated request of its agent. As to this surreptitious and falsified interpolation, admittedly so acted upon by the company as to thus far defeat a recovery upon the policies, the Circuit Court made an express finding (6th finding, pp. 32-3) to the effect that it was inserted by the company's agent after the application had been signed and delivered to the company, without the knowledge of the assured, and the assured never learned of it (findings 9, 12, 13, 14, pp. 33-4).

The application as signed and delivered called for a whole year's insurance (exclusive of the month of grace) not to take effect *until the delivery of the policies and the payment of the premium*, to-wit: on December 26, 1893 (par. 4, p. 13, and 7th finding, p. 33). The forged interpolation, "please date policy same as application," is construed by the company itself in its own amended and substituted answer as a request (par. 2, p. 20) to have the policies take effect at the date of the application, to-wit: December 12, 1893; and the answer declares that such was the import and result of the interlineation, and that the company strictly complied therewith in the form of the policies delivered. It is too clear for argument that the defendant did not carry any risk until the policies were delivered and the premium paid—December 26, 1893. The Court of Appeals admits this.

The application called for a whole year's insurance, not from the date of the application, but from the date of the delivery of the policies and the payment of the premium. This was the express agreement now settled by an express finding (7th finding, p. 32). The falsified insertion of the company's agent is, therefore, admitted to be diametrically opposed to the express agreement made conclusive upon this Court by the 7th finding (p. 33). *The company insists that the policies by their terms are responsive to the falsified interpolation, and not to the agreement as found in the 7th finding, or to the genuine application.*

It is pertinent and proper to insist that the company's own interpretation of the natural meaning and the actual result of the agent's interpolation conclusively makes it the falsified interpolation of the company itself.

The only "request" addressed to the company in this regard was the agent's wrongful insertion in the application, which the answer of the company (par. 2, p. 20) now makes responsible naturally and actually for the entire grief of this controversy.

Judge Sanborn says that this interpolation (p. 80) is immaterial, first, because it was not complied with; and, second, because it misstated no fact which conditioned the insurance. But the company's answer (par. 2, p. 20) insists that it was complied with, and shows a material and inconsistent provision, naturally and logically robbing the assured of his express agreement with the company (7th finding, p. 33), and that it determined how the policies should be written up. Judge Shiras expressly found that the promise of thirteen months' insurance for the first premium conditioned the insurance on the part of the assured. Add to the falsified interlineation the additional falsehoods at the time of the delivery of the policies and the payment of the premium (findings 4, 9, 12, 13, 14), presumably made and intended to put the assured off his guard, and we have both legal fraud and bad faith. The conduct of the company through its agent is certainly worse than

any alleged negligence of the assured, and it is pertinent to inquire on whom the loss should fall. Had it not been for the wrongful insertion, unknown to and concealed from the assured, the defense to this suit admittedly would have no basis, and the respondent should be estopped from reaping any advantage from the fraud. The respondent ought not to be allowed to plead its own wrong to forfeit and defeat the policies.

Continental Ins. Co. v. *Chamberlain*, 132 U. S., 304.
Union Mut. L. Ins. Co. v. *Wilkinson*, 13, Wall., 222.
Am. Ins. Co. v. *Mahone*, 21 Wall., 152.
N. J. Mut. L. Ins. Co. v. *Baker*, 94 U. S., 610.

Had the assured died prior to December 26th, 1893, the company would and could have successfully denied the existence of any binding insurance contract, under the terms of the application (par. 4, p. 12), and yet it now says in its answer (par. 2, p. 20) that the policies took effect December 12, 1893, responsive to the agent's forged interpolation, notwithstanding the express agreement of the parties (7th finding, p. 33), repeated in the application, that the contract of insurance should *not* take effect until the delivery of the policies, to-wit: on December 26, 1893.

We ask to be indulged in reiterating that the interpolation, "please date policy same as application," was forged by the agent of the company after the application had been signed and delivered to the company, to gratify his cupidity, without the knowledge of the assured, and was affirmatively concealed from the assured, and that the company's own answer says "said application also contained a request (please date policy same as application) that said five policies each should be issued, dated and take effect the same date as the application, namely, the 12th day of December, 1893, and said request was complied with, and the policies were so issued." But the policies did not "take effect the same date as the application." The finding and the contract are both to the contrary.

At whose door is laid the cause of petitioner's loss, if he must lose? The company admits by its answer that this con-

troversy is grounded upon the words, "please date policy same as application," and on the testimony of the agent himself, the trial court found the interpolation material, wrongful and unknown to the assured. Were it not for this insertion, the payment of the second premium certainly could not have been called for at a date earlier than the actual date of the policy, which would have obviated this whole controversy.

A forfeiture could not be asserted in this case but for the fraudulent counter-proposition delivered to the assured, and the doctrine of estoppel will not permit the company to avail of a forfeiture so procured.

VI.

THE APPLICANT MADE SURE THAT THE APPLICATION AS SIGNED CONFORMED TO THE AGREEMENT. THE COMPANY ASSUMED TO ITSELF THE DUTY OF TENDERING A POLICY IN CONFORMITY WITH THE APPLICATION.

If the request, "please date policy same as application," means that the insurance shall be in force from December 12, the date of the application, as alleged in the answer (p. 20), it is plainly contrary to the application *as signed*. By reading the application at the time of signing and delivering the same to the agent, this fatal insertion could not have become known for the simple reason that it was interpolated afterwards by the respondent's agent. What might be the law had this fatal clause been in the application when signed, but not noticed because not read, is not before the Court. The fact that applications must be signed would seem to impose an obligation to read before signing. At most one is bound to know its contents only as signed. McMaster was not negligent in not discovering that fatal "request" because it was first inserted by the respondent's agent after it came into the local office

signed. The fatal "request" was written into the policy without the fault or knowledge of the assured. Its presence there was due solely to the cupidity of the agent. It was the agent's fault that the "request" appeared in the application when it was received at the home office. The assured did not know of it; he had made no such "request." *As signed* the application contained *the very opposite* request and agreement. The applicant did agree that the policy might rest on and conform to the application as the basis of the contract. He never agreed that the policy might conform to or rest on forgeries subsequently and secretly interpolated into the application. He made sure that the application was right when he signed it. The duty of writing a policy that conformed thereto and of copying the application into the policy was the *self-assumed* duty of the respondent. The forgery was interpolated by the chosen and accredited agent of the respondent. The trusting of the application for transmission to the agent of the local office was authorized by the respondent. Indeed, after the signing, the applicant is not permitted to possess the application. The respondent should bear the consequences of a fraud so clearly originating with its own accredited and authorized agent, even if innocent itself. Well may May on Insurance, 4th ed., p. 292, say in commenting on the *Fletcher* case: "If the agent had altered the application after A. (assured) had once made sure it was right and signed it, the case would wear a different aspect." The fault is exclusively that of the agent and the company. Technically, the fault lies at the door of the home office. The agent's interpolation was of course wrongful and unknown to the assured. But the words, "please date policy same as application," do not necessarily mean that the policy shall "*take effect*" from the date of the application. It seems to have been so construed, however. The answer says so (par. 2, p. 20). Yet such was not its natural import when read in connection with par. 4, p. 12, of the same application, stating that the policy was *not* to be in force until after payment of the premium and delivery. This necessarily

meant a date later than the writing up of the policy at the home office. Therefore, the fault may even be lifted from the agent and laid at the door of the home office of the respondent itself. But even if the payment of this loss should be considered one that the agent wrongfully imposed on his company, the custom of the company to exact bonds from its agents (31 Iowa, 225), or even the relation of agency itself, is a sufficient protection by allowing to the company a recovery over, or to indemnify itself against the agent. The fraud, however, was upon the applicant alone, for the company was very willing to give everything that is claimed for the money it received. The policy does not respond to the application *as signed*, and we think not even to the application as it now appears, through the fault of either the agent or the respondent, or both. To thus rob the assured of the only feature or provision that induced the contract is bad faith, and bad faith is much worse than negligence.

VII.

THE COMPANY WOULD AS READILY HAVE GRANTED THIRTEEN FULL MONTHS' INSURANCE FOR THE FIRST ANNUAL PREMIUM AS TWELVE MONTHS AND SEVENTEEN DAYS.

The findings show that the full thirteen months of insurance for the first annual premium was the controlling and winning inducement to the contract. Both parties knew that this provision secured the insurance. It was the point of superiority of the respondent's policy over the policy of competing companies. While the assured would not have signed the application nor accepted the policies if he had known that he was not getting thirteen full months of insurance, the respondent would not have refused to make the contract, but would just as readily have made it knowing that thirteen full

months of insurance were given. While this provision did not condition the insurance on the part of the company, it did condition the insurance on the part of the assured. It was his belief in the truth of the representation of thirteen months' insurance that secured the payment of the premium. Had McMaster not been lulled into receiving the policies without reading, he would not have received them at all. It is a distinguishing fact in this case that not twelve months and seventeen days, but thirteen full months of insurance was the heralded superiority of the policy of this company, and thirteen full months would just as readily have been granted as only twelve months and seventeen days. The fourteen days' reduction was not material or vital, or in any manner controlling, in the taking of the risk on the part of the respondent, but only on the part of the assured. A thirteen months' contract was not a fraud upon either party. It is certain that the respondent would just as readily have made the annual premiums payable on the 18th as on the 12th of December, save only for the forged request. The insured was innocent of any wrong intent, and believed that he was insured for thirteen full months, and in reliance upon that belief he postponed the taking of other indemnity. The only possible change of position because of the request was a reduction in time prejudicial only to McMaster. The company does not lose, but gains by the fraud of its agent, in which the assured had no part. This is not either good law or good morals. Neither the company nor the other policyholders can be said to suffer an unjust loss by permitting a recovery. They would not have avoided this loss by acting on the genuine application. This is not the case of an undesirable risk taken because of a concealed or unknown fact. The policies would not have been withheld if written up as agreed. An honest policy would have imposed no unexpected or undesired burden on anybody. *The respondent should not now be allowed to recede, after the assured is dead, from a contract that it is absolutely certain it would have willingly made at the beginning save only for its agent's fraud, of which the assured was innocent.*

Inasmuch as the parties agreed in the written
lication that the contract should not be in force
m the date of the application but only from the
te of the delivery of the policy, the company did
t follow but openly violated every business usage
d custom of the insurance world in making the
ntract effective at a date earlier than the date
the policy, not for the purpose of indemnity but
r the single purpose of forfeiture.

VIII.

THE POINT IN CONTROVERSY AFFECTS ONLY THE FORFEITURE CLAUSE. THERE WAS A VALID CONTRACT OF INSURANCE FOR LIFE. THE CONTROVERTED PROVISION DOES NOT GO TO THE FACT OR ESSENCE OF THE CONTRACT.

It seems clear to the petitioner that the minds of the parties met to the end that there should be insurance, and that a consummated contract for insurance resulted. Such a contract is not for a year, or for any number of years, but for life, regardless of the failure to pay subsequent premiums. It is brought to an end only by the provision for forfeiture. This forfeiture provision is only one of a great number of provisions in the contract of insurance, which is a complete and valid contract of insurance without the forfeiture provision. *The minds of the parties actually met on the contract of insurance for life, and that contract is valid and binding upon the respondent. The minds of the parties did not meet on the present forfeiture provision, and, therefore, that provision is not the contract of the parties and is not binding. The doctrine of estoppel allows parol proof of, and will enforce, the actual forfeiture provision.*

IX.

THE PETITIONER CONTENDS THAT THE PROVISIONS OF THE WRITTEN AGREEMENT, WHEN PROPERLY CONSTRUED GRANT THIRTEEN MONTHS OF INSURANCE FOR THE FIRST ANNUAL PREMIUM.

This proposition is so convincingly elaborated by Judge Shiras in his opinion on pp. 35-52 of the record, and in his

opinion in the equity case printed as an appendix to petitioner's brief in support of the petition for certiorari, that we adopt the statement and argument of that learned judge as our argument on this proposition.

This Court, in the *Withers* case, *supra* (177 U. S., 260), has approved the case of *Kister* v. *Insurance Company*, 128 Pa. St., 553, which contains the following language:

"Forfeitures are odious in law, and are enforced only where there is clear evidence that that was what was meant by the stipulation of the parties. There must be no cast of management or trickery to entrap the party into a forfeiture."

The assured paid the first full annual premium, which paid for thirteen months of insurance, counting the month of grace. This much was promised. The promise was positively renewed as an existing fact, under the terms of the completed policies, at the time of the delivery. The assured received and paid for the policies, and the insurance started to run, December 26, 1893. He died January 18, 1895. He paid for thirteen full months of insurance, and the policies are susceptible of a reasonable construction that will grant it. Whatever may be the effect of the date, December 12th, upon renewals for insurance in subsequent years, having accepted and retained the first full annual premium, under the written and oral agreement that the insurance should not begin until the delivery of the policies and the payment of the premium, the assured should not now be subjected to a forfeiture which in effect forfeits insurance already paid for.

"It is claimed that the policy was forfeited *eo instanti* upon October 30, 1895, because the second quarterly premium was not paid upon that date. This contention is based upon a clause of the policy which declares that this policy "shall be *ipso facto* null and void if premiums are not paid when due." The construction of the policy here contended for would recognize and approve a harsh doctrine indeed. It would be carrying the doctrine of forfeiture to unconscionable lengths. By payment of the first quarterly premium, the deceased was insured for three months. This was necessarily the contract be-

tween the parties. This clause of forfeiture for nonpayment of premiums was never intended to forfeit the privileges of insurance already paid for. No insurance policy ever attempted to do such a thing. This contention, if sound, would not only result in the forfeiture of present paid-up insurance, but would result in the forfeiture of a portion of the premiums already paid."

Methvin v. *Fid. Mut. Life Ass'n*, 58 Pac. Rep., 387.

The application that is made a part of the policy, and that preceded it in time, restates the agreement of the parties on the point (par. 4, p. 12), "That any policy which may be issued under this application *shall not be in force* until the actual payment to, and acceptance of the premium by, the company." It necessarily follows, therefore, that the contract of insurance went into effect only on delivery of the policies and the payment of the premium therefor, to-wit: on December 26, 1893. But the company exacted "the full first annual premium, or the sum of $21 on each policy" (9th finding, p. 33). On the face of the policy, in conspicuous location, are the words "annual premium, $21" (p. 6). That bought and paid for a full year's insurance from December 26, 1893, to which must be added the special inducement of an extra month of grace (p. 9), which admittedly was a special feature of this company's policies, that both attracted and secured the insurance in controversy.

The date of payment of the second annual premium may have force in connection with continuing the insurance in force for subsequent years, but was never intended, and ought not to be permitted, to chop off fourteen days' insurance, for which the company received, and still retains, payment. Unquestionably the assured bought *thirteen months'* insurance for $105. The provision that the policy should not go into effect until it was delivered and paid for was material and valid, and would have been asserted by the company if necessary. That provision, if inconsistent with other provisions in the policy (resulting from the forged interlineation), is still a part of the policy, because the application is expressly so made, and preceded the policy in time, and should be held to control in re-

spect to the understanding of the amount of insurance that was secured to the assured for "the full first premium."

Whether the right to continue the policy in force for subsequent years became fixed by the date, December 12th, on the face of the policies, is immaterial, because nothing is claimed under or in respect to any second or subsequent premium; but the company ought not to be permitted to use that date to reduce the period of insurance for which it received, and still retains, the assured's money. The assured was entitled to the insurance *already settled and paid for*, to-wit: thirteen months of insurance whether he made the second annual premium payment on December 12, or never. It is an unjust and unreasonable construction to say that the company promised and intended to grant the assured thirteen months' insurance, and received full payment therefor, by the payment of the full first annual premium, and then adroitly worded its policy so that the assured could not get the promised thirteen months of insurance for the full first annual premium without first paying the full second annual premium.

Under the respondent's contention two annual premiums would have been demanded of the assured within less than one year.

The month of grace is a whole month. No construction is reasonable that takes away fourteen days of the month of grace. Either there is a whole month of grace or there is no grace at all. That appears to be self-evident. The company and the assured agreed that there should be no insurance from the date of the application, December 12th, to the date of the delivery of the policies, and the payment therefor, December 26th. It is so nominated in the bond (par. 4, p. 12), and the same is made a part of the policy (par. 5, p. 12). The company was not entitled, therefore, to payment for the period of non-insurance, and, inasmuch as it clearly stipulated in writing when the policy should go into force, that stipulation should be made effective; and as the company collected and received

"the full first annual premium" it should be held to have sold the assured that which he bought and paid for, namely: a full year's insurance, plus an additional month of grace.

If the *second* annual premium had been made payable on the date corresponding to the date of the policy, to-wit: on December 18th, then this controversy could never have arisen.

Packhill v. *Brighton*, 61 Iowa, 103.
Iowa Code of '97, Sec. 23, p. 125.
Sec. 26, Chap. 677, New York Laws, 1892.

The application contemplates thirteen months' insurance for the first annual premium.

In the application as signed it was provided that "the premium (was) to be payable annually" (5th finding, p. 32). The words "semi-annually" and "quarterly" were stricken out in the record below, but are inadvertently not so stricken out in the printed record here. The fifth finding, however, corrects this error. The opinion of the Court of Appeals says "the application provides that the premiums shall be paid annually." This then means at least a year's insurance for the first premium. The respondent prepared its own forms and was painstaking to state in the application that the policy that might be issued under the application should "*not be in force*" from the date of the application but only "until the actual payment to, and acceptance of the premium by, said company, or an authorized agent, during my lifetime and good health" (par. 4, p. 12). This provision remained in the application when made a part of the policies, and shows the utter falsity of the allegation of the answer (par. 2, p. 20), if that actually means that McMaster was insured from December 12, 1893. The application forbids this, and the risk was not advised or the policy written up or signed until its date, December 18, 1893 (p. 6). The policies on their face make the application a part thereof, and so the same exclusion of insurance from the date of the application to the date of the payment of the premium and the delivery of policies is again emphasized therein. Judge Sanborn argues that time must

elapse between the writing of the policy in New York and the delivery in Iowa. Very true. But if the company exacts the agreement that the insurance shall *not* be in force *until delivery*, it should either adjust the language of the policy as written in New York to the exactions of the application, or else permit the agent to fill in the delivery date theretofore purposely left blank. However, we are not driven to this extent, for there is no custom of making the annual premium payable *earlier* than the date of the policy in the home office, unless the agreement in the application is for immediate insurance. Where, as in this case, the parties agree that the insurance shall *not* go into force until delivery, the custom is universal *not* to make the annual premium payable on a date earlier than the date of the policy, and that is sufficient for a recovery in this case. The application, therefore, calls for a whole year's insurance. The month of grace is an additional month. The giving of this month of grace beyond the year is admitted. The answer (par. 2, pp. 20, 24) pleads it. The policy prints it (p. 9). At the time of the application this feature of thirteen months' insurance was used as an inducement by the agent, who "pressed upon McMaster the provision adopted by the company and set forth in *circulars* issued by the company, and *printed* on the back of the policies"—this month of grace. The application, therefore, contemplates thirteen months of insurance for the first annual premium.

The policies as issued grant thirteen months' insurance for the first annual premium.

The policy makes the application a part of the contract of insurance (p. 6). Each policy on the margin by conspicuous print announces "Annual premium, $21.00." The contract was that the premiums should be paid annually (5th finding, pp. 32, 11). On December 26, 1893, "McMaster paid the agent *the full first annual premium*" (9th finding, p. 33). "It was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies, and that the contract of insurance was *not* to take effect until the policies were delivered" (7th finding, p. 33, and application, par. 4, p. 12). The

month of grace is admitted in the answer (p. 20) and indorsed on the policy (p. 9). Up to this point the written contract shows that McMaster bought and paid for thirteen months' insurance, and that the time should be counted only from the delivery of the policies, December 26, 1893.

But respondent says that these provisions cannot be given their plain literal meaning because of the out of the way fine print indorsement on the back of the policies at the foot of page 8 of the record, and that this, read in connection with the face of the policies, shortens the insurance to twelve months and seventeen days.

The date, December 12, on the face of the policy, in itself need not frighten. It is only oxygen. The forfeiture clause at the foot of page 8 of the record was harmless in itself, and was "concealed in a mass of rubbish on the back of the policy." It is only nitrogen. The explosion comes only when these innocent antipodes are allowed to come together. We join May on Insurance, p. 307, in asking the Court to read Chief Justice Doe's comments on such insurance contracts, printed in his work on insurance, 4th ed., pp. 358-361.

May not these apparently inconsistent provisions be permitted to refer to the right of "renewal" as involved in the payment of subsequent premiums rather than to the shortening of insurance *already paid for?* They could then stand together.

This is the construction given by Judge Shiras (record, pp. 35-52). McMaster understood that the "insurance would continue in force for the period of thirteen months from the date of the policies," and relied thereon even to the postponing of the taking of other indemnity (findings 4, 12, 13, 14, 15, 16, pp. 34-5). The respondent's agent so represented (finding 9). If the New York statute of notice fixes the "due date," then the thirteen months of insurance is consistent with even this forfeiture provision, for the words "when due" in the forfeiture clause (p. 8) would be a date fixed by "the expiration of thirty days after the mailing of such notice" (see argument herein

under headings XI, XII and XVII) and the date on the face of the policy. At any rate the inconsistency creates ambiguity as to provisions which the agent said gave thirteen months of insurance for the first premium, and in this belief and in reliance thereon the insurance was induced and consummated.

X.

NO ESTOPPEL OPERATES AGAINST THE PETITIONER. THE RESPONDENT (p. 21) PLEADS THAT THE PETITIONER IS ESTOPPED FROM QUESTIONING THE FORGED INTERPOLATION.

Section 2, of Chapter 211, Laws of Iowa, approved March 31, 1880 (printed in appendix), provides that the company shall be forever precluded from the benefit of any application unless it attaches a true copy thereof to the policy, and that the insured is entitled to the full benefit thereof whether annexed or not. The company did not attach a true copy to the policy, but a false copy.

The effect of this section would seem to be that the respondent could not use the false copy at all while the petitioner has the right to use the genuine "application or representations of the assured * * * at his option." The Iowa Court has held that this statute does not require that the insured examine the copy of the application endorsed on the policy.

Donnelly v. *Ins. Co.*, 70 Iowa, 696.
Ellis v. *Ins. Co.*, 64 Iowa, 507.
Wallace v. *Ins. Co.*, 66 Iowa, 139, 142.
Cook v. *Fed. L. Ins. Co.*, 74 Iowa, 746.
Sections 1819, 1815 and 1749, Code of Iowa, 1897, retain these laws.

There is, however, a better answer to this position of the respondent, which, in short, is the very equity of the petitioner's cause as developed in his entire brief.

XI.

THE PROVISION (p. 9) OF THE POLICY: "IF ANY PREMIUM IS NOT THUS PAID ON OR BEFORE THE DAY WHEN DUE THEN (EXCEPT AS HEREINAFTER OTHERWISE PROVIDED) THIS POLICY SHALL BECOME VOID, AND ALL PAYMENTS PREVIOUSLY MADE SHALL REMAIN THE PROPERTY OF THE COMPANY," CONTRAVENES THE NEW YORK STATUTE AND IS VOID.

The New York statute (set out in the Appendix hereto) fixes the only possible grounds or manner under which a forfeiture may be successfully declared and enforced. *It is not within the power of the parties to add to, limit or set aside the paramount provisions of the statute.* The mere failure to pay the premium on the stipulated day is not enough to terminate the insurance contract; to do that, the New York statute of forfeiture must be strictly complied with. The foregoing clause, therefore, in the policy, as construed by the Circuit Court of Appeals, should be held null and void.

Hurst Home Ins. Co. v. *Muir*, (Ky.) 53 S. W. R., 3.
Mutual Life Ins. Co. v. *Hill*, 97 Fed. Rep., 263.
Mutual Life Ins. Co. v. *Dingley*, 100 Fed. Rep., 408, 414.
Equitable Assur. Soc. v. *Nixon*, 81 Fed. Rep., 796.
Equitable Assur. Soc. v. *Trimble*, 83 Fed. Rep., 85.
Osborne v. *Home Life Ins. Co.* 123 Cal., 610.
May on Insurance, 4th ed., §356 A, note (a.)
Johnson v. *Ins. Co.*, 109 Iowa, 711.

XII.

THE "DUE DATE" IS AMBIGUOUS, INDEFINITE AND ELASTIC, AND THE ALLOWANCE OF THIRTEEN MONTHS' INSURANCE FOR THE FIRST FULL ANNUAL PREMIUM DOES NOT VARY THE TERMS OF THE POLICIES.

The opinion in *Baxter* v. *Brooklyn Life Ins. Co.*, 119 N. Y., 454, holds that the "due date" is not fixed by the nominal date

of premium payment on the face of the policy, but by the expiration of thirty days after giving the statutory notice. And the dissenting opinion in that case emphasizes the holding of the majority to be that "the premium does not become *due* until after notice and expiration of the thirty days." The "due date," therefore, of the premium, under the *Baxter* case, *supra*, is fixed by the New York statute (set out in Appendix hereto) and not by the face of the policy, and may be postponed beyond the policy date of December 12th, simply by delay in giving the statutory notice. (*Johnson* v. *Ins. Co.*, 109 Ia., 711.)

A note to sec. 356 A, May on Ins., 4th ed., states:

"The New York statute wisely provides that there shall be no forfeiture of a life policy without notice. Under this statute the required notice cannot be waived by agreement, and the forfeiture of a policy for non-payment of premiums does not depend upon such non-payment according to the terms of the policy, but upon their non-payment after the notice prescribed by the statute has been given. *DeFreee* v. *National L. Ins. Co.*, 136 N. Y., 144; *McDougal* v. *Provident Sav. L. Assn.*, 125 N. Y., 551; *McMaster* v. *New York L. Ins. Co.*, 99 Fed. Rep., 856; *Mutual L. Ins. Co.* v. *Dingley*, 100 id., 408; *Hathaway* v. *Mutual L. Ins. Co.*, id. 534; *Johnson* v. *Ins. Co.*, 109 Iowa, 711."

The company had a leeway in the giving of this notice of at least thirty days, and, therefore, was able to extend the "due date" without violating the terms of any agreement whatever, and at the same time fulfill its promises and representations, because the "due date" is determined by the New York statute, and is made to depend upon the giving of the notice. The time when the notice shall be given, or, indeed, the fact of giving any notice at all, finds no expression in the agreements of the parties; nor would delay enough in giving the notice to keep good the promise of the company run against the rule of parol evidence.

Suppose the statutory notice had been mailed twenty-four days before December 12, to-wit: November 18, 1894, then the "due date" would become fixed at December 18, 1894. The Court will observe that this date of December 18 is the ac-

tual date of the policies. The date of the annual premium could not have been earlier under the agreement *not* to put the insurance in force until *delivery* (par. 4, p. 12; 7th finding, p. 33), during which interim the company did not carry the risk. To this must be added a "grace of one month" (p. 9), for grace is a gratuity, an "*undeserved kindness*," which must be additional to and not an over-lapping of the statutory period. This would extend the policies to January 18, 1895, without offending against either the rule of parol evidence or the actual agreement of the parties, and would give the assured twelve months' insurance for the annual premium, and a month of grace not covered by the premium already paid, namely, thirteen months of insurance for the first premium. But for the fraudulent interpolation of the agent this is probably just what would have happened.

Or suppose the statutory notice had been given on November 26. This would have established the "due date" at December 26th, and "the month of grace" would have continued the policies until January 26, 1895, and the assured would have had his policies in force for thirteen months exactly according to the agreement. A policy, however, in force on January 18, 1895, the date of his death, equally answers the purposes of the situation, and the policies in controversy would have been in force January 18, 1895, if the annual premium had been made payable on December 18, that being the date of the policies themselves.

The findings (finding 14, pp. 34-5) expressly state that the assured believed his policies were in force for the period of thirteen months from their date, and acted in a business transaction upon that basis. The words "when due," near the bottom of page 8 of the record, do not in terms refer to the date "the 12th day of December" on the face of the policies (p. 6), and should be held to refer to the statutory "due date" as fixed by the foregoing case of *Baxter* v. *Brooklyn Life Ins. Co.*, 119 N. Y., 454.

Inasmuch as this construction had been given to the identical language of these policies prior to their issue, and the

company permitted the language of its policies to remain unchanged after the *Baxter* case had been made public, and had established the legal meaning of the word "due," the company must be held to have acquiesced in that construction, for otherwise it would and should have revised or changed the language of its policies in respect thereto. The company was advised by the settled law of the *Baxter* case that policy holders would accept their policies relying upon the meaning of the word "due" as established by that case. It could not continue to issue its policies without modifying their terms in this respect, after the statute had been construed by the highest judicial tribunal of its own state, without being held to have acquiesced in, or at least to be absolutely bound by, such judicial construction of the continued language of its policies.

Fidelity & Casualty Co., v. *Lowenstein*, 97 Fed. Rep., 17, and cases therein cited.

XIII.

WHEN POLICIES OF INSURANCE CONTAIN AMBIGUOUS, CONTRADICTORY, CONFLICTING OR INCONSISTENT PROVISIONS, EFFECT WILL BE GIVEN TO THE PROVISIONS MOST FAVORABLE TO THE ASSURED, AND THAT CONSTRUCTION WILL BE ADOPTED WHICH IS MOST FAVORABLE TO THE ASSURED.

National Bank v. *Ins. Co.*, 95 U. S., 673.

Grace v. *American Central Ins. Co.*, 109 U. S., 278.

Moulor v. *American Life Ins. Co.* 111 U. S., 335.

American Surety Co. v. *Pauly*, 170 U. S., 133.

Trav. Ins. Co. v. *McConkey*, 127 U. S., 661, 666.

Thompson v. *Phenix Ins. Co.*, 136 U. S., 287, 297.

Imperial Ins. Co. v. *Cass County*, 151 U. S., 452, 462.

Indemnity Co. v. *Dorgan*, 16 U. S., App. 290, 309; 7 C. C. A., 581; 58 Fed. Rep., 945.

Insurance Co. v. *Randolph*, 24 C. C. A., 305; 78 Fed. Rep., 754, 761, 762.

Kister v. *Insurance Co.*, 128 Pa. St., 553.

Under rules of proper construction, these policies should be construed to grant thirteen full months of insurance for the first annual premium. This argument is elaborated by Judge Shiras (pp. 35-52), and we adopt his reasoning.

The month of grace (p. 9; par. 2, p. 20) is an admitted extra month that went to make up the thirteen months of insurance, so we may lay aside that month as a benefit secured and conceded.

The agreements in controversy should admit of a construction that would grant a full year's insurance for the first annual premium, plus an additional month of grace, regardless of the question of future insurance. The month of grace is always to be considered as an indulgence, as a gratuity (p. 20). It is admitted that the company was paid and retains the purchase price of thirteen months' insurance, and if this judgment shall stand by the grace of the parol evidence rule the fraud of the agent will cheat the assured out of fourteen days. The forfeiting provisions should be construed as effecting the right to renewals, that is, as affecting a continuation of the policies in force in subsequent years, and not as a limitation upon the time for which the premium had already been paid. Having paid for thirteen months of insurance the assured should not be subjected to a forfeiture which in effect "would result in the forfeiture of a portion of the premium already paid."

Methvin v. *Fid. Life Ass'n.* 58 Pac. Rep., 387.
Ins. Co. v. *Norton*, 96 U. S., 234.
Ins. Co. v. *Eggleston*, 96 U. S., 572.
Thompson v. *Ins. Co.*, 104 U. S., 252.
Ins. Co. v. *Doster*, 106 U. S., 30.
Ins. Co. v. *Russell*, 144 U. S., 439.

XIV.

THE CONTROVERTED PROVISIONS OF THE POLICIES ARE DIFFICULT OF INTERPRETATION, UNCERTAIN AND AMBIGUOUS.

Upon this proposition, we would ask the Court to carefully consider the cases cited by Judge Caldwell, and especially *N. Y. Life Ins. Co.* v. *Dingley*, 93 Fed. Rep., 153, and *Rosenplanter* v. *Providence Sav. Life Assr. Soc.*, 96 Fed. Rep., 721, in which the Circuit Court of Appeals of the Ninth and Sixth Circuits show the difficulty of interpretation under the New York statute relating to forfeitures. The *Dingley* case sets out the New York statute and also sets out a notice doubtlessly prepared and used in hundreds of thousands of cases by the respondent herein, and holds the notice fatally defective. The same kind of a notice was given in this case.

The fact is disclosed by the *Dingley* case, and, indeed, by all the cases cited by Judge Caldwell from New York State and the Federal Courts, that the respondent company itself has never been able to prepare a form of notice under the New York statute and its form of policy sufficient to work a forfeiture for nonpayment.

This would seem to be sufficient proof of the difficulty of interpretation and the uncertainty and ambiguity of the provisions of the agreements in controversy to warrant this Court in saying, as was said in *Fidelity & Casualty Co.* v. *Lowenstein*, 97 Fed. Rep., 20, that there is created "a doubt as to its proper interpretation of sufficient gravity to be resolved in favor of the insured."

Not only is the counter-proposition (the policy) a part of the same agreement as the application (proposition), between which there is a loss to the assured of fourteen days' insurance as conceded by Judge Sanborn, but the application contains the provision (p. 12), "that any policy which may be issued under this application shall *not* be in force until the pay-

ment to and acceptance of the premium by said company," with which should be considered the 7th finding, as follows, to-wit: "By the express understanding had between F. W. Smith, the agent of the New York Life Insurance Company, and Frank E. McMaster, when the application for insurance was signed, it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies, and that the contract of insurance was not to take effect until the policies were delivered;" and also the falsified interpolation, "please date policy same as application," the controlling effect of which is conceded in the defendant's answer (par. 2, p. 20), in the following words, to-wit: "Said application also contained a request that said five policies each should be issued, dated and take effect the same date as the application, namely, the 12th day of December, 1893, and said request was complied with, and the policies were so issued," which likewise involves a proposition and counter-proposition to the extent of fourteen days' variation in the time when the insurance went into effect. Provisions thus diametrically opposed to each other would seem to make manifest the inconsistency and ambiguity of the insurance contract, and to furnish the basis for a rule of construction permitting a recovery.

The masterly opinion of Judge Shiras on this proposition, construing the terms of the policies, *as granting thirteen full months of insurance upon their face*, should at least create a doubt as to the difficulty of construction of sufficient gravity to warrant a Court in resolving the question of interpretation in favor of the insured.

XV.

NO INTENT TO DECEIVE OR MISLEAD IS NECESSARY.

Judge Thayer in his concurring opinion assumes that the representations of the agent to be material had to be made with intent to deceive or mislead. But neither a fraudulent

purpose nor an intent to deceive or mislead is essential to the application of the doctrine of estoppel.

Leather Man. Nat'l Bank v. *Morgan*, 117 U. S., 96.
Dickerson v. *Colgrove*, 100 U. S., 580.
2 Pomeroy, Eq. Jur., §805.
Dair v. *United States*, 16 Wall., 1-4.

See also the petition for rehearing, record, pp. 113-17.

"Fraud or bad faith is not a requisite of estoppel."
Ewart on Estoppel, p. 97.

It is always enough if the conduct or representations naturally result in accomplishing a legal fraud.

"It has long been held that where it is a breach of good faith to allow the truth to be shown, there an admission will estop."

Bank v. *Morgan*, 117 U. S., 96.

The doctrine of equitable estoppel may be applied in a law action.

Barnard v. *German Seminary*, 49 Mich., 444.
Kirk v. *Hamilton*, 102 U. S., 777.
John Shilleto Co. v. *McClung*, 45 Fed., 778.
Ins. Co. v. *Wilkinson*, 13 Wall., 222.

XVI.

SMITH WAS THE AGENT OF THE COMPANY. X

The Iowa statute, Sec. 1749, Code of '97 (set out in appendix hereto), contains an old provision that "any person who shall hereafter solicit insurance, or procure application therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application, policy or contract to the contrary notwithstanding." The

X The findings (3rd, 6th, 7th, 8th, 9th, pp. 32-3) are conclusive that Smith was the agent of the company. No limitation is stated.

following authorities hold that this statute applies to cases like this:

Jamison v. *Ins. Co.*, 85 Iowa, 229.
Cook v. *Association*, 74 Iowa, 746.
Assurance Soc., v. *Clements*, 140 U. S., 226.
Indemnity Company v. *Berry*, 1 C. C. A., 561.
Cont. Ins. Co., v. *Chamberlain*, 132 U. S., 394.
N. Y. Life Ins. Co., v. *Russell*, 77 Fed. Rep., 94.
Washington Bank v. *Hume*, 128 U. S., 195, 206.
Joyce on Insurance, Sec. 194.

While we elsewhere, under the pleadings and the facts peculiar to this case, contend that, in the absence of any conflicting Iowa statute or forbidding public policy, the New York statute applies and controls on the question of forfeiture, we are not inconsistent in also contending that no matter what the agreement of the parties may be on the agency question, and especially where, as in this case, neither the agreements nor issues assume the contrary, the agent Smith, by virtue of the Iowa statute and the facts, was the exclusive agent of the respondent. Indeed, the answer seems to clothe the agent with authority to actually insure (par. 2, p. 2).

XVII.

THE SPECIAL FINDING AS TO NOTICE IS INSUFFICIENT TO WARRANT THE JUDGMENT OR TO SUSTAIN THE SAME ON APPEAL.

The special findings of the Circuit Court must be accepted as conclusive in this Court, and the only question for this Court to consider is whether they sustain the judgment.

The failure of the Circuit Court to find an essential fact, or the insufficient or imperfect finding of any fact essential to support the judgment, is fatal to the judgment.

A statement of the legal effect of a document not in the record, nor made a part of the findings, nor its contents anywhere set out or disclosed, is not a finding of fact, but a mere conclusion of law, and is of no force.

The respondent sought to forfeit the policies by giving a notice in deference to the New York statute of forfeiture.

The application declares this insurance contract to be a New York contract (p. 12). The policies refer expressly to this New York statute as Chapter 690, Laws of 1892, of the State of New York (p. 10), and they are made payable, in case of loss, in New York State (p. 6), and were there advised, issued and dated, and there proofs of death were to be made (pp. 6, 9). New York is the place of performance. The application is expressly made a part of the policies (div. 5, p. 12), and it is expressly provided therein "that the contract contained in said policy and in this application shall be construed according to the laws of the State of New York, *the place of said contract being agreed to be the home office of said company in the City of New York*" (p. 12). Moreover, the answer expressly alleges compliance with a New York statute (par. 4, p. 20; finding 10, p. 35).

Ins. Co. v. Chew, 21 Sup. Ct. Rep. 106

In its brief before the Court of Appeals, the respondent said: "We alleged in our answer the sending of the kind of notice required by the statutes of New York. * * * No one would certainly contend that the notice plead and proved was not the notice required by the statutes of New York." There is no conflicting Iowa statute relating to notice, and no forbidding public policy is violated by adopting the agreement of the parties that the New York statute of forfeiture shall apply.

This New York statute is set out in full in the opinion of Judge Caldwell (pp. 99-100), and in the Appendix hereto.

The burden of proof to show that a legal and sufficient notice was properly given rests upon the insurance company.

It must show a strict compliance with the terms of the statute before it can assert a forfeiture. The requirements of this statute, and each of them, are rigidly enforced under plain, definite and exacting decisions of the Court of Appeals of the State of New York, which decisions are binding on the Federal Courts.

Baxter v. *Insurance Co.*, 119 N. Y., 454, holds that:

"This statute was a part of the contract in question, and governs the rights and liabilities of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy."

See also,

Defreece v. *Insurance Co.*, 136 N. Y., 151

Phelan v. *Insurance Co.*, 133 N. Y., 147.

Griffith v. *Insurance Co.*, 101 Cal., 627.

Johnson v. *Ins. Co.*, 109 Iowa, 711.

N. Y. Life Ins. Co., v. *Dingley*, (C. C. A., 9th Circuit), 93 Fed. Rep., 153.

Rosenplanter v. *Prov. Sav. Life Assr. Soc.* (C. C. A., 6th Circuit), 96 Fed. Rep., 721.

Mutual Ins. Co. v. *Hill*, 97 Fed Rep., 263.

Mutual Ins. Co. v. *Dingley*, 100 Fed. Rep., 408.

The only finding of fact on the question of notice reads as follows:

"10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the State of New York" (p. 34).

There is an utter failure to find any of the requisite facts showing a compliance with the New York statute by the company.

The New York statute requires that the notice shall be mailed "at least fifteen and not more than forty-five days prior to the day when the same (premium) is payable." The general statement that a notice was sent "*not later than November 17*,

189½," is not the finding of an ultimate fact. It is not a finding that the notice was not sent more than forty-five days prior to the day when the premium was payable, in which event the statute would make the notice void. The notice might well have been sent sixty days prior thereto, and still the finding would be absolutely true; yet the plain requirements of the statute would not be satisfied.

The statute requires that the notice "shall be duly addressed and mailed to the person whose life is insured;" but for anything that appears the notice may have been sent to Alaska, unaddressed, by a private messenger.

There is no finding that the letter was properly addressed or mailed to the assured "at his last known postoffice address, postage paid."

The finding does not show, as the statute requires, that a written or printed notice was given stating the amount of the premium due on the policies; the place where and the person to whom the premium should be paid; nor that the notice was sent to the assured properly addressed, prepaid and mailed within the period of time required by the statute; nor that a notice was sent notifying the assured when the premium would become due and payable; nor that unless the premium was paid the policies and all payments thereon would become forfeited and void as provided by the statute.

The only finding that even attempts to satisfy the requirements of the New York statute is the latter part of this 10th finding: that a notice was sent "in accordance with the requirements of the statutes of the State of New York." But this clause must be construed in reference to and limited by the finding itself that the notice was "of the coming due of the premium on the policies" in controversy, and such a restricted notice is wholly insufficient and fatal, for it omits a dozen other equally essential requisites, even if sent "in accordance with the requirements of the statutes of New York," as to this one particular. In assuming to specifically state one

of the terms of the notice, the finding should be held to exclude all the others not mentioned. If the finding should be held to refer to the notice set out in the answer (p. 20, par. 4), then the notice given was fatally defective.

Inasmuch as none of the essential contents of the notice are found, nor anywhere given, the last clause of the 10th finding is without force or effect to sustain the judgment, because it states a mere conclusion of law, and not the finding of an ultimate fact. The general statement that a notice was sent "of the coming due of the premiums" at some unstated time does not sufficiently state the ultimate fact.

U. S. v. *Harris*, 77 Fed. Rep., 825.
Cooper v. *French*, 52 Ia., 531.
12 Ency. Pl. & Pr., 1038-1046.
Daube v. *Phil. Ry. Co.* 77 Fed. Rep., 715-16.
Keene Mach. Co. v. *Barratt*, 100 Fed. Rep., 590,593.

"Findings of fact which merely announce certain legal conclusions deducible from facts not stated are not sufficient to support a judgment."

8 Ency. Pl. & Pr., 943.
Kane v. *Rippey*, 22 Ore., 299.

The burden of proving a strict compliance with all the essential requirements of the statute being upon the company, and the special findings being silent as to every essential fact of notice, the Court is bound to infer an insufficient notice, for nothing can be supplied to such findings by intendment. Every fact essential to support the judgment must affirmatively appear in the findings.

U. S. v. *Harris*, 77 Fed. Rep., 812, 825.

An insufficient finding upon any material issue or fact has the same legal effect as no finding at all, and, therefore, is equivalent to an express finding against the party on whom the burden of proof rests, which in this case was the company.

"It must be remembered, however, that silence in a special verdict or finding upon any issue or question of fact is equivalent

to an express finding thereon against the party on whom was the burden of proof."

Keene Mach. Co. v. *Barratt*, 100 Fed. Rep., 590, 593.

See also opinion of Judge Caldwell (pp. 99-101) on this proposition.

XVIII.

THIS COURT SHOULD ORDER JUDGMENT TO BE ENTERED IN FAVOR OF THE PETITIONER.

The special findings of the Circuit Court are such (18th finding, p. 35) that this Court should reverse both the Circuit Court of Appeals and the Circuit Court, and remand the case with suitable instructions to enter judgment in favor of the petitioner and against the respondent for the sum of $5,965, together with interest thereon from November 1, 1898, and for costs in all the Courts.

Scott v. *Hickman*, 112 U. S., 150.
Allen v. *St. Louis Bank*, 120 U. S., 20, 40.
Evans v. *Kister*, 92 Fed. Rep., 828, 833.

Respectfully submitted,

Kenny J. Taylor,
F. E. GILL,
E. A. BURGESS,
Solicitors for Petitioner.

Kenny J. Taylor,
Sioux City, Iowa,
Of Counsel for Petitioner.

APPENDIX.

IOWA STATUTE.

Chapter 211, Laws of 18th G. A. of Iowa, provides:

"Section 1. Any person who shall hereafter solicit insurance, or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding.

"Section 2. All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy, or indorse thereon, a true copy of any application or representations of the assured, which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of this section, it shall forever be precluded from pleading, alleging, or proving such application or representations, or any part thereof, or falsity thereof, or any parts thereof, in any action upon such policy; and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representations, but may do so at his option.

* * * * * *

"All the provisions of this chapter shall apply to and govern all contracts and policies of insurance contemplated in this chapter, anything in the policy or contract to the contrary notwithstanding."

See *Ins. Co.* v. *Chamberlain*, 132 U. S., 304; also 1897 Iowa Code, sections 1749, 1750, 1815 and 1819, covering same subject.

NEW YORK STATUTE OF NOTICE.

"No Forfeiture of Policy Without Notice. No life corporation doing business in this state shall declare forfeited or

lapsed any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of nonpayment, when due, of any premium, interest, or installment or any portion thereof, required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment, or portion due thereof on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known postoffice address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen, and not more than forty-five, days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy, and all payments thereon, will become forfeited and void, except as to the right to a surrender value, or paid-up policy, as in this chapter provided. If the payment demanded by such notice shall be made within the time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given." Laws 1892, c. 690, art. I., par. 92.

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JAMES H. McKENNEY,
Clerk.

No. 523

Brief of Hubbell v. Odell

For Respondent.

BRIEF OF RESPONDENT.

Filed Feb. 7, 1900.

IN THE

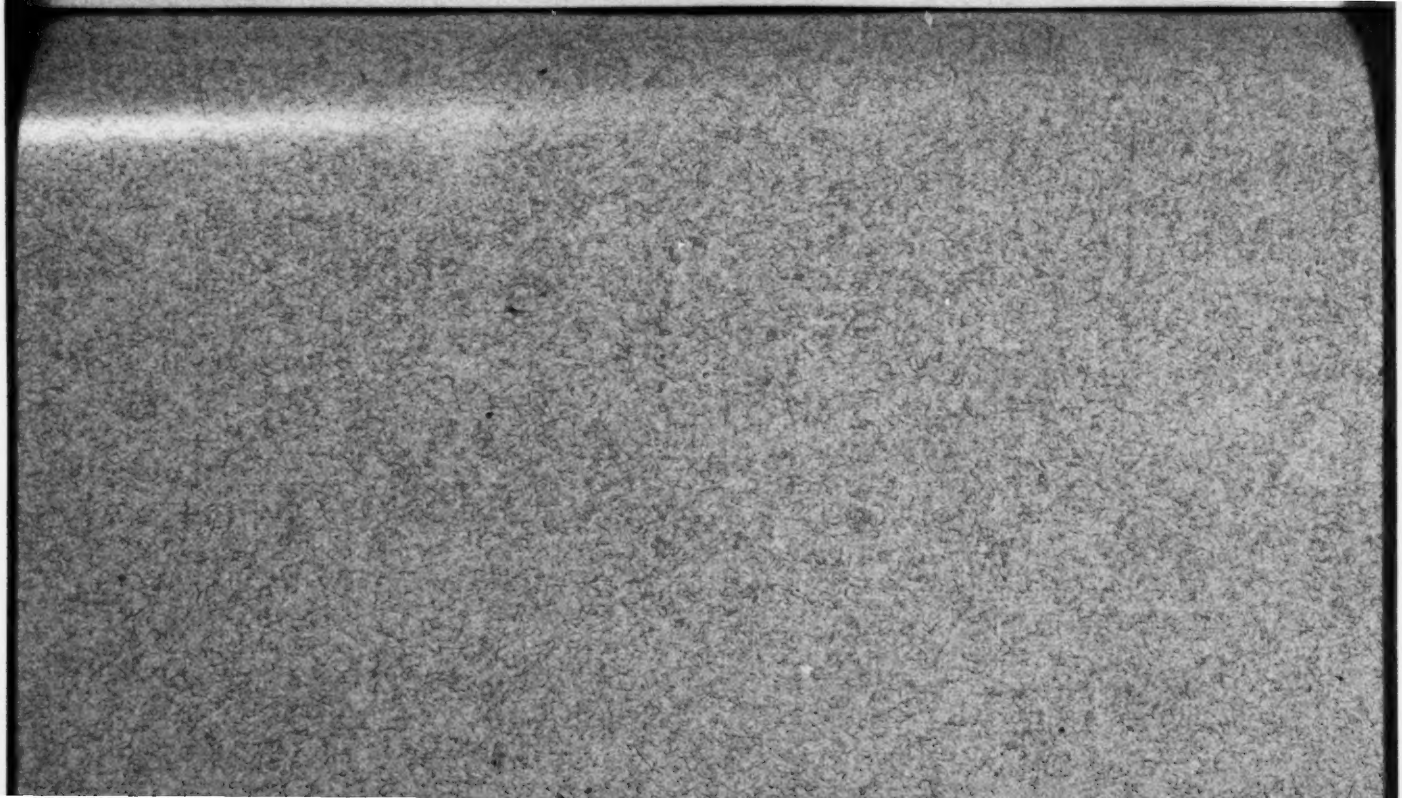
Supreme Court of the United States

OCTOBER TERM, 1899.

IN THE CASE OF FRED A. McMASTER, ADMINISTRATOR OF THE ESTATE OF FRANK E. McMASTER, DECEASED, APELLANT AND PETITIONER.

vs.

NEW YORK LIFE INSURANCE COMPANY, APPELLEE AND RESPONDENT.



BRIEF OF RESPONDENT.

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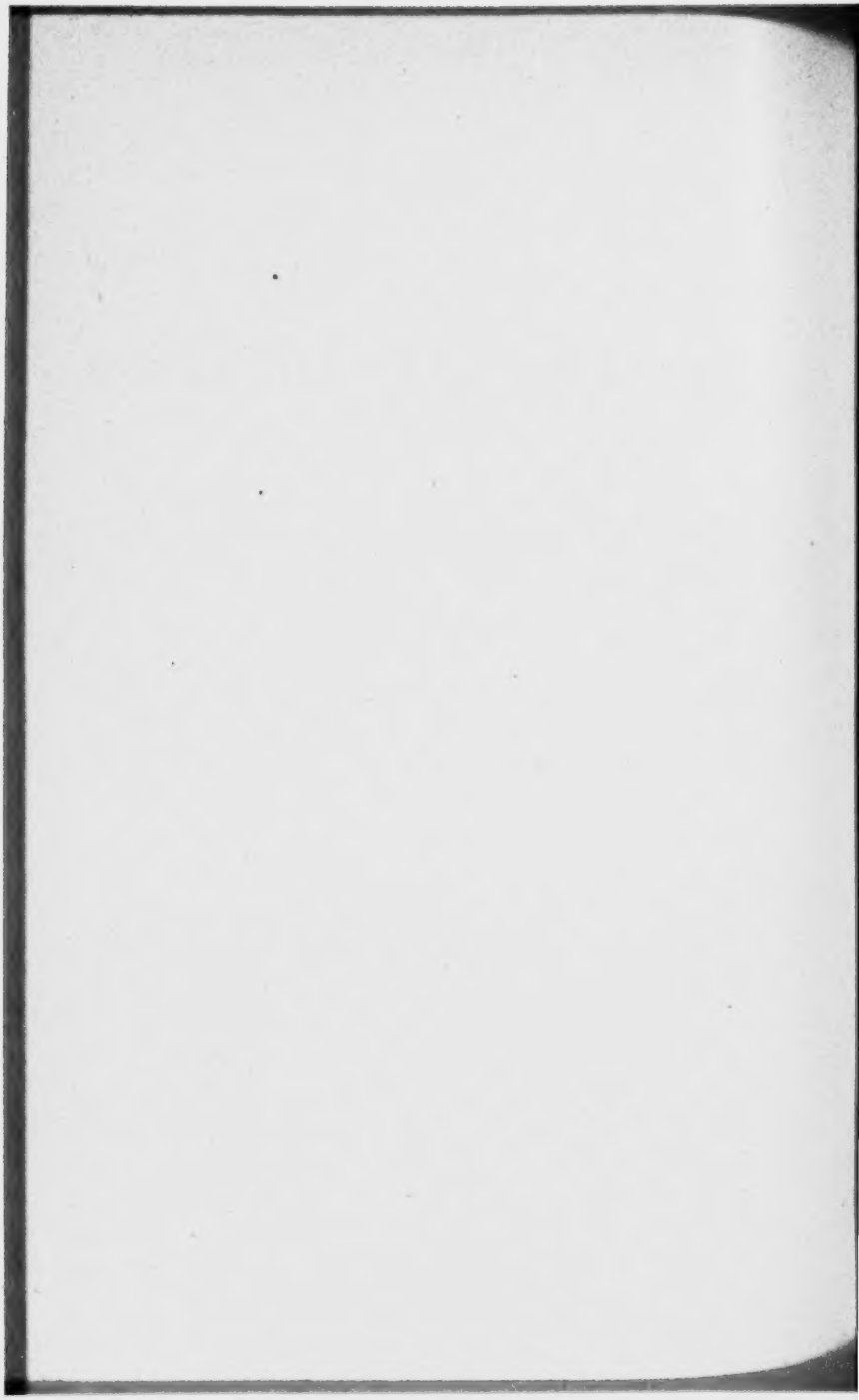
vs.

NEW YORK LIFE INSURANCE COMPANY, APPELLEE AND RESPONDENT.

G. W. HUBBELL, New York City.

W. E. ODELL, Des Moines, Iowa, *Solicitors and of Counsel for Appellee and Respondent.*



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vs.

NEW YORK LIFE INSURANCE COMPANY, APPELLEE AND RESPONDENT.

BRIEF ON THE PART OF RESPONDENT.

To the Honorable, the Supreme Court of the United States:

The respondent respectfully shows to this Honorable Court as follows:

THIS LITIGATION.

The notice of petitioner's intention to apply for a writ of certiorari was served upon local counsel of respondent at Sioux City, January 23d, 1900, and came into our possession January 24th, 1900. We have applied to counsel for petitioner for copy of his brief, but up to this date, January 30th, 1900, have not succeeded in obtaining same. We feel that we cannot with

safety wait longer and are obliged to prepare our brief without seeing the brief of petitioner. This treatment is in harmony with previous conduct of counsel all through this long and tedious litigation. When application was made to this court for writ of certiorari in the equity case the notice was served on respondent's counsel the 17th day of May, 1898, in the afternoon. We were obliged to prepare our brief, have same printed and on file at Washington not later than the morning of May 23d, 1898. The same tactics were resorted to in the trial court and in the Circuit Court of Appeals.

This case was commenced on or about the 10th day of May, 1895. There have been two trials in the Circuit Court, one hearing for writ of certiorari, which was denied by this court in the equity action. It has been twice heard and decided in favor of respondent in the Circuit Court of Appeals. There have been five decisions rendered in this case, four in favor of this respondent. One of these was by the trial court, two by the Circuit Court of Appeals and one by this Honorable Court in denying the application for the issuing of a writ of certiorari in the equity action. One decision for petitioner, which was the first decision in the case, and was by the Circuit Court reforming the policies in question, which decree was reversed. When the second decision of the Circuit Court of Appeals was filed the petitioner herein filed a petition for a re-hearing, which was denied.

It is but fair to parties litigant that there should come finally an end to litigation and that they should not be harassed either by desire of parties to recover upon lapsed life insurance policies, or where the litigation is continued purely by malice. We submit that the respondent has suffered sufficient in this litgation for refusing to pay policies that were lapsed by their express terms for non-payment of premiums. It has become not only an outrage upon the rights of this respondent, but it

is a reflection upon the intelligence of the Courts to be asked to continue writing opinons in this case and reiterating their findings over and over.

As we have before stated these policies had lapsed by their express terms for the non-payment of premiums. That is all there is in the case stripped of the fine spun theories of counsel for petitioner, and the Circuit Court of Appeals has twice held this to be the fact and has held that the company is not liable. Now, should this court be called upon to issue its writ and go all over this case that has been so thoroughly investigated by the Court of Appeals, both in the equity and the law actions, and so often adjudicated? If that rule should be followed, then the creation of the Court of Appeals would be a delusion and a snare, for then, instead of relieving this court, it would act only to increase and multiply its labors and burdens, and in effect give to every party aggrieved by the decision of the Court of Appeals the right to take his case to this Honorable Court for final decision. No, that was not the intention or purpose of the Act creating the Circuit Court of Appeals. This Honorable Court has laid down the rule when it will reach out its writ to review and determine whether the Court of Appeals has kept within the rule contemplated by the Act of its creation, and this case does not come within it, as this Court decided in refusing to issue the writ in the equity case. The cases are practically identical, except that one is an equity action to reform the policies and the other is a law action to recover upon the policies that the Circuit Court of Appeals held should not be reformed.

The disposition upon the part of counsel for petitioner to prolong this litigation beyond the bounds of reason must be apparent to this court when it considers the number of trials and adjudications had and the length of time that the case has been in the courts. The counsel for petitioner have arrived at the desperate stage of the drowning man grasping at a straw, and

it is to be hoped, for the sake of all parties concerned and the cause of litigation generally that these gentlemen will not be permitted further to harass this respondent with expensive and fruitless litigation.

CIRCUIT COURT OF APPEALS' DECISIONS.

Judge Sanborn, in the opinion of the Circuit Court of Appeals, filed on the 11th day of December, 1899, answers far better than we are capable of doing the contention of petitioner and disposes of all of the grounds upon which petitioner hopes to obtain the issuing of the writ, and shows the fallacy of the contention of the petitioner. We respectfully call the attention of this court to that decision. The Circuit Court of Appeals, in its opinion filed in the equity case, uses these words in the opening sentence: "In form this is a suit in equity to reform a written contract. In fact it is a bald attempt to supercede written agreements with the parol negotiations which preceded and induced them."

In the opening of the opinion of this same court in deciding the law action, and which is the decision this petitioner is now complaining of and is asking this court to review, these words are found:

"This is another attempt to cause prior and contemporaneous parol statements of the terms and legal effect of written agreements to prevail over the plain stipulations of the writings themselves. The argument of the counsel for the plaintiff in error, when reduced to its last analysis is that because in the parol negotiations which preceded the delivery of the policies in suit the agent of the insurance company informed the deceased that his policies would insure his life for thirteen months without the payment of the second annual premiums and because when he delivered the policies to him he told him that they did so insure him, therefore this preliminary information

and this contemporaneous statement must supersede the written contracts, which expressly provide that the policies shall cease to be binding if the second premiums are not paid by January 12, 1895, twelve months and seventeen days after the policies were delivered. This proposition, as it affects the policies in this case, was considered, and our decision concerning it was rendered in a suit in equity to reform these policies, which is reported under the title New York Life Insurance Company vs. McMaster, 57 U. S. App. 638, 30 C. C. A. 532, 87 Fed Rep. 63, and the Circuit Court of Appeals for the Sixth district has since rendered a like decision upon a similar state of facts in McConnell vs. Provident Savings Life Assurance Society, 92 Fed. Rep. 769. The views expressed in our opinion in the former suit undoubtedly met the approval of the Supreme Court, for it denied an application to issue a writ of certiorari to review our decision. 171 U. S. 587."

These two quotations briefly but pointedly sum up the whole contention of petitioner and show how unreasonable and unjust this contention is.

A certified copy of the opinion of the U. S. Circuit Court of Appeals affirming the judgment of the Circuit Court in the law action we have filed with the clerk of this court. This opinion was filed December 11th, 1899, and has not as yet been published. We respectfully adopt the opinion of the majority of this court and ask that it may be considered as a part of our argument.

WAIVING JURY—EVIDENCE—FINDINGS OF FACTS

In the trial court the jury was waived by stipulation filed and the case tried to the court. Judgment was rendered for the respondent and this judgment was affirmed by the Circuit Court of Appeals. A petition for re-hearing was filed and denied. It is of this decision in the law action affirming the judgment of

the lower court that petitioner complains. It is the practice when a jury is waived the court finds the facts from the evidence introduced. The evidence in the trial of the case cannot be and is not considered by the Court of Appeals or by this Court, as we understand the practice, and all reference to the evidence in this application or to what the evidence was in the equity action (an entirely distinct case and different and separate evidence) is improper and not permitted. The findings of facts complained of by this petitioner are as follows:

"By written stipulation duly signed and filed, the parties to this action waived a jury trial, and consented to try the case before the Court, and the evidence having been fully submitted the Court finds the facts established by the evidence to be as follows:

1st. The plaintiff Fred A. McMaster [—] when the suit was brought and is now, the lawfully appointed administrator of the estate of Frank E. McMaster, deceased, having been appointed administrator of the named estate by the Probate Court of Woodbury County, Iowa, and furthermore said plaintiff was, when this suit was brought, and is now a citizen of the State of Iowa, and a resident of Woodbury County, Iowa.

2d. That the defendant, the New York Life Insurance Company [—] when this suit was brought and is now, a corporation created under the laws of the state of New York, having its principal place of business in the City of New York in the State of New York, but being also engaged in carrying on its business of life insurance in the State of Iowa and other states.

3d. That in December, 1893, F.W. Smith, an agent for the New York Life Insurance Company, residing at Sioux City, Iowa, solicited Frank E. McMaster to insure his life in that Company, and as an inducement to taking the insurance, pressed upon McMaster the provision adopted by the company

and set forth in the circulars issued by the company, and printed on the back of the policies issued by the company under the heading "Benefits and provisions referred to in this policy" in the following words: "After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent per annum for the number of days during which the premium remains due and unpaid, during said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance.

4th. Relying on the benefits of this provision and in the belief that if he accepted a policy of insurance upon his life, from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed, since the last payment of the annual premium, the said Frank E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on and attached to the petition, the same being made part of this finding of facts.

5th. In the application when signed by Frank E. McMaster, it was provided that the amount of insurance applied for was the sum of $5,000, to be evidenced by five policies for $1,000 each on the ordinary life table, the premium to be payable annually.

6th. There now appears on the face of the application, interlined in ink, the words, "please date policy same as application." These words were not in the application when it was signed by McMaster, but after the signing thereof, they were written into the application by F. W. Smith, the agent of the New York Life Insurance Company, without the knowledge or assent of

Frank E. McMaster, and were so written in by the agent in order to secure to the agent a bonus which the company allowed to agents for business secured during the month of December, 1893, and it does not appear that Frank E. McMaster ever knew that these words had been written into the application, and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company and was acted on by the company.

7th. By the express understanding had between F. W. Smith, the agent of the New York Life Insurance Company, and Frank E. McMaster when the application for insurance was signed, it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies and that the contract of insurance was not to take effect until the policies were delivered.

8th. The defendant company, at its home office in New York City, upon receipt of the application, determined to grant the insurance applied for and issued five policies, each for the sum of $1,000, dated December 18th, 1893, and reciting on the face thereof that the annual premium on each policy was $21 and forwarded the same to its agent, F. W. Smith, at Sioux City, Iowa, for delivery to Frank E. McMaster. These five policies are in the form of the one attached to the petition in this case, which is hereby made part of this finding of fact, and each policy contains the recital: "This contract is made in consideration of the written application for this policy, and of the agreements, statements, and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and ....cents to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy."

9th. The five policies, enclosed in envelopes, on or about

December 26th, 1893, were taken by F. W. Smith, the agent of the defendant company, to the office of Frank E. McMaster, who asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him and thereupon McMaster paid the agent the full first annual premium or the sum of twenty-one dollars on each policy and without reading the policies he received them and placed them away.

The agent did not in any way attempt to prevent McMaster from reading the policies and he had full opportunity for reading them, but in fact did not read them and accepted them on the statement of the agent of the company as herein above set forth.

10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the State of New York.

11th. The renewal receipts for the second annual premium on the five policies held by Frank E. McMaster in the defendant company were sent for collection to Mary A. Ball, at Sioux City, Iowa, who, on the 11th or 12th day of December, 1894, called on said McMaster for payment of the premiums in question. At that time McMaster declined making payment thereon, saying that he had seen other policies which promised better results and that he did not think he would renew the insurance in the defendant company. Miss Ball told him the New York contracts had some nice provisions, like thirty days of grace and loans, and in reply to an inquiry from McMaster, stated that his policies entitled him to the month's grace in the payment of the premiums and that, as he understood it, the grace on the second premium would expire January 11th, and

McMaster said if he concluded to keep any of the insurance he would call and pay for it before the grace expired.

12th. That in November or December, 1894, Frank E. McMaster was examined for the purpose of obtaining life insurance, by the agents of the Union Central Insurance Company, it being understood between the parties that the policies were not to issue until in January, 1895, and it being the purpose of McMaster to take one or two thousand dollars insurance in the Union Central Company, at the expiration of his insurance in the defendant company, but also to continue part of the policies held in the defendant company.

13th. That on or about January 15th, 1895, the agent of the Union Central Company, meeting McMaster on the street in Sioux City, told him the policies issued by the Union Central Company had been received, and in reply McMaster said: "All right, just hold them; there is no hurry about them," and in the same conversation he stated that he had other insurance, referring to the policies in the defendant company.

14th. That the action of Frank E. McMaster shows, and the court so finds the fact to be, that the said McMaster believed that the policies issued to him by the defendant company would continue in force for a period of thirteen months from the date of the policies, and his action with respect to the policies in the defendant company and the proposed insurance in the Union Central Company was based upon and governed by this belief on his part.

15th. That Frank E. McMaster died at Sioux City on the morning of January 18th, 1895.

16th. That up to the time of his death, the said Frank E. McMaster had not paid the second year's premiums on the policies issued to him by the defendant company, nor have the same been paid since his death, nor had the said McMaster received

or paid for the policies issued by the Union Central Company, and the same had not been delivered or become effectual.

17th. That due and sufficient notices and proofs of the death of said Frank E. McMaster were immediately sent to and received by the defendant company, and due demand for the payment of the five policies sued on was made by the plaintiff, as administrator of the estate of Frank E. McMaster, and refused by the defendant company, on the ground that the policies in question had lapsed and were not in force at the time of the death of said Frank E. McMaster, by reason of the failure to pay the second year's premium coming due on said policies.

18th. That the defendant company has not paid such policies or any part thereof, and assuming the same to be valid, there is due thereon, November 1, 1898, the sum of ($5,965.00) five thousand nine hundred and sixty-five dollars, after deducting from the face of the policies the amount of the second premiums, with interest thereon, to March 14, 1895."

The policy is annexed by copy to the petition and is made a part of the findings, and will be found in the record. The policies, five in number, are, in form and amount, identical.

In the 9th finding of facts the court says in the latter part of the finding that "The agent did not in any way attempt to prevent McMaster from reading the policies and he had the full opportunity for reading them, but in fact did not read them and accepted them on the statement of the agent of the company as herein above set forth."

In finding 11th it is found that payment of the premium was demanded on the 11th or 12th of December, 1894, and payment was declined, "saying that he had seen other policies which promised better results and he did not think he would renew the insurance in the defendant company. Miss Ball told him the New York contracts had some nice provisions, like thirty days of grace and loans, and in reply to an inquiry from Mc

Master stated that his policies entitled him to the month's grace in payment of the premiums, and that as she understood it the grace on the second premium would expire January 11th, and McMaster said if he concluded to keep any of the insurance he would call and pay for it before the grace expired."

Now, what do these two findings show? They show, in the first place, that no fraud was practiced upon McMaster, nor was there any fraud or deceit thought of by any one. In the second place they show that McMaster had full opportunity to read the policies. Nothing was done to prevent him from reading them; that he had them in his possession and control from the time of their delivery until his death. And further they show beyond question that on the 11th or 12th of December, 1894, McMaster was asked to pay the premiums, and was told then when the premiums were due, and further told when the thirty days of grace would expire, namely January 11th thereafter, and McMaster then said "if he concluded to keep any of the insurance he would call and pay for it before the grace expired." (Last part of finding of facts No. 11.)

He never called and never paid the premiums. He evidently had decided not to carry this insurance any longer. The claim of fraud by petitioner seems to be disposed of fully in these two findings, Nos. 9th and 11th.

AS TO THE STATUTORY NOTICE.

The question as to whether the statutory notice was sent to McMaster as required by the New York statute, is disposed of in the 10th finding of facts, which is as follows:

"10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums of the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the State of New York."

It cannot be claimed that the evidence introduced in the trial of the law action by the court, the jury having been waived, upon which this is based should have been considered in the Circuit Court of Appeals or can be considered by this Court. As we view it, this finding disposes of this question of notice as required by the New York statute in favor of respondent. The Circuit Court of Appeals is of the same opinion.

The attempt of petitioner to have the Circuit Court of Appeals to pass upon the sufficiency of pleading this notice, said pleading not having been challenged in the trial court nor any objection made to same, also failed. Upon page 18 of certified copy of opinion filed of the Circuit Court of Appeals disposes of this contention that the notice was not properly pleaded in favor of respondent, as follows:

"Another position of counsel for the plaintiff in error is that this judgment should be reversed because the service of the notice of the amount of the second annual premiums, of the date when they fell due, and of the effect of a failure to pay them, was not well pleaded under the law of the State of New York upon this subject, which was made a part of the policies. But the question is not here for our consideration. The service of the notice was clearly averred, whether with such accuracy and particularity that the plea would have been impervious to a demurrer, it is not necessary to inquire, because this pleading was not challenged below and the court heard the evidence upon this subject without objection and found that the notice was sent 'in accordance with the requirements of the statutes of the State of New York.' When a case is tried by a Federal Court without a jury and the resulting judgment is brought by a writ of error to an Appellate Court for review it is only 'the rulings of the court in the progress of the trial of the case' and the sufficiency of the facts found to support the judgment that can be reviewed. Rev. Stat. Sec. 700. In such a case this is a court for the correction of the errors of the court below only. As a

question of the sufficiency of this pleading was never brought to the attention of, or ruled upon by the trial court, it certainly committed no error regarding it and there is nothing in this point for us to review or correct. *Mercantile Trust Co. vs. Wood*, 19 U. S. App. 566, 671; 8 C. C. A. 658, 660; 60 Fed. Rep. 346, 348; *Gowden vs. Burnham*, 19 U. S. App. 448; 8 C. C. A. 248, 59 Fed. Rep. 752; *Norris vs. Jackson*, 19 Wall. 125, 127; *Ins. Co. vs. Folsom*, 18 Wall. 237, 249; *Cooper vs. Omohundro*, 19 Wall. 65, 69; *Martinton vs. Fairbanks*, 112 U. S. 670; *Lehnen vs. Dickson*, 148 U. S. 71".

The policy annexed by copy to the petition and made a part of the findings is set out in full in the record.

Where parties or their attorneys file a stipulation in writing with the clerk of the court waiving a jury, in which case the suit may be tried by the court and the finding of the court upon the facts, which may be either general or special, has the same effect as the verdict of a jury.

Rev. Stat., Sections 648-649-700.

No review in the Supreme Court or Circuit Court of Appeals can be had upon writ of error in such case, unless there is a special finding from the evidence of ultimate facts by the court. If the facts are found by the court, to which exception is taken and judgment has been rendered upon them, the question for the Supreme Court or the Circuit Court of Appeals on error would be whether the facts found were sufficient to support the judgment.

Garland & Ralston Federal Practice, 232 and cases cited in note 4.

Section 700 Rev. Stat. provides in case the finding is special under the provisions of this section it must be a finding of certain fact propositions which the court believes to be established by the evidence, and not the evidence upon which these con-

clusions rest. If the finding is general or special it has the same effect as the verdict of a jury and consequently is conclusive of the facts found. When the record contains special findings of fact, but no bill of exceptions, the error of law relied upon by a plaintiff in error must be considered and determined upon the findings. (*C., M. & St. P. Ry Co. vs. Hoyt,* 149 U. S. 1.)

WHEN WRIT SHALL ISSUE.

This Honorable Court has clearly laid down the rule in reference to issuing writs of certiorari and we submit that this case is not one that comes within the rule.

Forsyth vs. Hammond, 166 U. S. 512-514.

Lau Ow Bew, Petitioner, 141 U. S. 583-587.

Lau Ow Bew, Petitioner, vs. United States, 144 U. S. 47-58.

In re Woods, 143 U. S. 202.

Am. Const. Co. vs. Jacksonville Ry. Co., 148 U. S. 372-383.

In *Forsyth vs. Hammond,* 166 U. S. 512-514, the court said: "Obviously, a power so broad and comprehensive, if carelessly exercised, might defeat the very thought and purpose of the Act Creating the Courts of Appeal. So exercised, it might burden the docket of this court with cases which it was the intent of Congress to terminate in the Courts of Appeal and which, brought here, would simply prevent that promptness of decision which in all judicial actions is one of the elements of justice. So it has been that this court, while not doubting its power has been chary of action in respect to certioraries."

In the Lau Ow Bew case (U. S. Rep. 141, pages 583-587) this court said: "It is evident that it is solely questions of gravity and importance that the Circuit Court of Appeals should certify to us for instruction; and that it is only when such ques-

tions are involved that the power of this court to require a case in which the judgment and decree of the Court of Appeals is made final to be certified can be properly invoked. The inquiry upon this application, therefore, is whether the matter is of sufficient importance in itself and sufficiently open to controversy to make it the duty of this court to issue the writ applied for in order that the case may be reviewed and determined as if brought here on appear or writ of error."

It is possible that we are presuming too much upon the patience of this court.

A lawyer, in his anxiety to protect the interests of his client and omit nothing, often goes further in referring to simple and familiar principles than is necessary. The disposition heretofore shown in this litigation by counsel for petitioner to refer to the evidence in the Court of Appeals and the reference to the record and evidence in the equity case referred to in the law action in the Circuit Court of Appeals is the excuse we offer for burdening the record with the authorities cited upon practice in cases like this, where the jury has been waived. As the Circuit Court of Appeals has said in its opinion in the law action, that court is not the proper place to object to or even correct pleadings that are not objected to in the trial court. This being the rule laid down by the Circuit Court surely this Court will not issue its writ to bring up the record to review a question of pleading in the trial court, especially when such pleading was not objected to or challenged in the trial court. The Circuit Court of Appeals considered this question fully.

We have not attempted to discuss the authorities at any length, believing that the decision of the Circuit Court of Appeals in the equity action (*N. Y. Life Ins. Co. vs. McMaster*, 87 Fed. Rep. 63), the refusal of this Honorable Court to issue the writ of certiorari applied for in the equity action, and also the last decision of the Circuit Court of Appeals in the law

action, which was filed on the 11th day of December, 1899, considered all of the questions involved in this litigation thoroughly and exhaustively and disposed of all and every contention of petitioner. We contend that the writ of certiorari should not issue in this case, for there is no valid reason for issuing said writ in cases of this kind; that there is less reason why the writ should issue in this case than there was in the equity case. Further, that a careful examination of the opinion of the U. S. Circuit Court of Appeals rendered in the equity case (*N. Y. Life Ins. Co. vs. McMaster,* 87 Fed. Rep. 63), and also in the law action will satisfy anyone that this petitioner has had his day in court, several of them in fact, and that every contention of his has had full and fair consideration, and after such consideration the courts have found against him and that he has no right to intrude further upon the patience and time of this or any other court, and for the further reason that this respondent is entitled to be protected from further annoyance and expense at the hands of this petitioner.

We most respectfully ask of this Honorable Court a careful examination of the two decisions of the U. S. Circuit Court of Appeals (*New York Life Ins. Co. vs. McMaster,* 57 U. S. App., 638) rendered in this case, and especially the one rendered in the law action (certified copy filed with clerk) and we feel satisfied that our client's interests will be protected, the application asking for the issuing of the writ denied and a stop put to further useless and harassing litigation, to which this respondent has been subjected for the last five years.

Wherefore this respondent asks this Honorable Court to deny the issuing of the writ of certiorari and respectfully submits this brief in resistance thereof.

GEORGE W. HUBBELL, New York City.
WILLIAM E. ODELL, Des Moines, Iowa.
Solicitors and of Counsel for Appellee and Respondent.

In Error 1899

MAR 2 1900
JAMES H. McKENNEY,
Clerk.

By Hubbell vs Kenney for Respt

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Mar. 2, 1900.

No. 523.

FRED A. McMASTER, ADMINISTRATOR OF THE ESTATE OF FRANK E. McMASTER, DECEASED, PLAINTIFF IN ERROR AND PETITIONER,

vs.

THE NEW YORK LIFE INSURANCE COMPANY, DEFENDANT IN ERROR AND RESPONDENT.

TO REVIEW A JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

GEORGE W. HUBBELL,
FREDERIC D. McKENNEY,
For the New York Life Insurance Company.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-2-1900

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 523.

FRED A. McMASTER, ADMINISTRATOR OF THE ESTATE OF FRANK E. McMASTER, DECEASED, PLAINTIFF IN ERROR AND PETITIONER,

vs.

THE NEW YORK LIFE INSURANCE COMPANY, DEFENDANT IN ERROR AND RESPONDENT.

Additional Brief in Opposition to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE.

The petitioner, Fred A. McMaster, as administrator of his intestate's estate, brought this action in the district court of Iowa in and for Woodbury county (R., 1), whence it was removed into the circuit court of the United States for the northern district of Iowa, western division, on the ground of diverse citizenship (R., 15), to recover from the defendant life insurance company $5,000, being the sum of five separate

policies for $1,000 each, which had been issued and delivered to the intestate on or about the 26th day of December, 1893 (R., 54, 9th). Jury was waived by stipulation of parties (R., 31), and the following, among other less material facts, were found by the court:

The application for the issuance was made at Sioux City, Iowa, and was dated December 12, 1893 (R., 12). It called for $5,000 of insurance on the "accumulation policy" plan, to mature in twenty (20) years, and contained the request: "Please date policy same as application" (R., 11).

The policies as issued, in addition to the agreement to pay the amount of the insurance immediately upon receipt and approval of proofs of death of the insured during the continuance of the policies, contained, in easily legible words, on their respective faces the following provisions:

> "This contract is made in consideration of the written application for this policy, and of the agreements, statements, and warranties thereof, which are hereby made a part of this contract and in further consideration of the sum of twenty-one dollars and — cents to be paid in advance, and of the payment of a like sum on the twelfth day of December, in every year thereafter during the continuance of this policy" (R., 6).
>
> * * * * * *
>
> "The benefits and provisions placed by the company on the next page, are a part of this contract, as fully as if recited over the signatures hereto affixed."
>
> * * * * * *
>
> *Benefits and Provisions Referred to in this Policy.*
>
> "Benefits at end of accumulation period.—If the insured is living on the 12th day of December in the year nineteen hundred and thirteen, on which date the accumulation period of this policy ends, and if the premiums have been paid in full to said date, the insured shall be entitled to one of the six benefits following:"
>
> * * * * * *

> "Grace.—After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5% per annum for the number of days during which the premium remains due and unpaid. During said month of grace the unpaid premium with interest as above, remains an indebtedness due the company, and in the event of death during said month this indebtedness will be deducted from the amount of the insurance" (R., 9).

That in soliciting the insurance defendant's local agent pressed upon the decedent's attention the provision of the policy last above quoted (R., 52), and—

> "Relying on the benefits of this provision and in the belief that if he accepted a policy of insurance upon his life * * * the company could not assert the right of forfeiture until thirteen months had elapsed since the last payment of the annual premium" the intestate signed the application above noted (R., 53).

The trial court further found that the words "Please date policy same as application" were written into the application by the defendant's agent after the signing thereof. * * * "And it does not appear that Frank E. McMaster (the insured) ever knew that these words had been written into the application and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company and was acted upon by the company" (R., 53).

The policies when issued were handed to the insured by the defendant's said agent, who, in response to insured's inquiry as to whether "the policies were as represented, and if they would insure him for the period of thirteen months," replied "that they did so insure him," and thereupon the insured paid the first premium on each policy "and without reading the policies he received them and

placed them away." The agent did not in any way attempt to prevent McMaster from reading the policies, and he had the full opportunity for reading them, but in fact did not read them, and accepted them upon the statement of the agent above set forth (R., 54, 9th).

In November, 1894, notice was sent to the insured "of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of New York"(R., 54, 10th), and on the 11th or 12th of December, 1894, defendant's agent, with the renewal receipts for the second annual premium, called on the insured to collect the premiums in question, which the insured declined to pay, "saying that he had seen other policies which promised better results and that he did not think he would renew the insurance in the defendant company."

The agent then stated that "the grace on the second premiums would expire on January 11, and McMaster said if he concluded to keep any of the insurance he would call and pay for it before the grace expired" (R., 54, 55, 11th).

The insured died at Sioux City on the morning of January 18, 1895 (R., 55, 15th).

The second year's premiums on said policies have not been paid, and, though sufficient proofs of death were forwarded and received by defendant company, the policies have not been paid, payment being refused on the ground that by reason of the failure to pay such premiums the policies had lapsed and were not in force at the date of the intestate's death (R., 55, 56).

Upon such findings and others less material to plaintiff's contention (R., 52–56) the trial court entered judgment in favor of the defendant (R., 56).

Upon writ of error from the circuit court of appeals for the eighth circuit this judgment was affirmed with costs (R., 102), and an elaborate petition for a rehearing of said cause was denied (R., 131).

To review and overturn the concurring judgments of the circuit court and the circuit court of appeals for the eighth circuit the petition for a writ of certiorari now before you has been filed.

ARGUMENT.

This case does not embrace any of the points of law raised in the various cases against another insurance company now pending on certiorari in this court.

Neither the construction nor application of a State statute claimed to affect vast lines of insurance business transacted without such State is here involved, nor is any novel question concerning the admission or rejection of evidence presented for decision.

The case does not turn upon and indeed does not disclose any question of gravity or importance, and it is not suggested that the writ should issue in the interest of uniformity of decision.

The entire controversy turns upon whether the facts found by the trial court and spread at large on the record in the nature of a special verdict justify the judgment entered. Upon writ of error, after elaborate discussion, the majority of the court of appeals was of opinion that such judgment was proper, and it was ordered to be affirmed.

The case has no general bearing or significance. The facts concern this case alone. The concurring judgments are noteworthy only as evidencing the application of familiar principles of law to the facts disclosed.

It is said to have been the purpose of the act of March 3, 1891, under which this application is made, to lighten the burden of business in this court, not to secure to dissatisfied litigants or adventurers a second review of their cases upon the merits, but to obtain such a review is the object of the present application.

The question before the trial court was whether upon the facts found the policies of insurance sued upon were alive or had expired. On their faces, the second annual premiums became due and the "accumulation periods" expired on the 12th day of March, though in different years. The early expiration of the "accumulation period" was evidently to the advantage of the insured. To have postponed the due date of the second premium would necessarily have postponed the expiration of the "accumulation period." The insured accepted the policies as written. He retained them in his possession without protest or criticism of their form or contents for more than a year. When his attention was specifically called to the fact that the second premium would fall due December 12, 1894, he made no remonstrance or objection, but said "he had seen other policies which promised better results, and that he did not think he would renew the insurance in the defendant company;" and when told that the month of "grace" allowed by the policies would expire January 11, 1895, he replied that "if he concluded to keep any of the insurance he would call and pay for it before the grace expired."

He did not call before the "grace" expired, nor did he pay the overdue premiums. He died January 18, 1895, and his administrator brought this suit.

2.

Prior to the passage of the act of March 3, 1891, which this court has declared was intended to reduce the volume of business on its ever-increasing dockets, jurisdiction to re-

view judgments and decrees of circuit courts was limited to causes where the matter in dispute, exclusive of costs, was in excess of $5,000, (Act May 1, 1875, 18 Stats., 316).

In an action upon a money demand, the matter in dispute "is the debt claimed and its amount, as stated in the body of the declaration, and not merely the damages alleged or the prayer for judgment at its conclusion must be considered in determining whether this court can take jurisdiction."

Shacker *vs.* Ins. Co., 3 Otto, 241.

Applying this test to the case at bar, it is apparent that prior to the passage of the court of appeals act this Court would have been without jurisdiction to review this case on writ of error. Under the court of appeals act it has had the benefit of a review in an appellate tribunal. It seems hardly probable that an unique provision of a law intended to reduce the number of cases coming to this court for review will be administered so as to secure to a commonplace case of no general interest, gravity, or importance, which could not have been reviewed by this court prior to the passage of that act, a second review upon the merits.

3.

During the pendency of this case in the circuit court the plaintiff herein filed a bill in equity to reform the policies of insurance here sued upon, so that they should conform to his contention as to the prior verbal agreement between his intestate and defendant's agent. The prayer of his bill was granted by the circuit court, which decreed accordingly. Upon appeal the circuit court of appeals reversed that decree and directed the bill to be dismissed. To review the action of the circuit court of appeals a petition for a writ of *certiorari* was filed in this court and promptly denied (171 U. S., 687). As the facts disclosed in that proceeding

were identical with those herein found, it would seem that the disposition of the latter application might well be governed by the action taken on the former.

It is respectfully submitted upon the whole matter that the petition should be denied.

GEORGE W. HUBBELL,
FREDERIC D. MCKENNEY,
For the New York Life Insurance Company.

Filed

FRED A. [illegible], Administrator of the Estate of Frank E. [illegible], Deceased, Plaintiff in Error and Petitioner,

vs.

THE NEW YORK LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR AND RESPONDENT.

W. R. Gorell,
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George W. Hubbell,
Frederic D. McKenney,
Of Counsel.

Judd & Detweiler, Printers, Washington, D. C. 1-23-01

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 199.

FRED A. McMASTER, ADMINISTRATOR OF THE ESTATE OF FRANK E. McMASTER, DECEASED, PLAINTIFF IN ERROR AND PETITIONER,

vs.

THE NEW YORK LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR AND RESPONDENT.

Preliminary Statement.

This is an action at law to recover the amount of five policies of insurance for $1,000 each, issued in favor of the plaintiff in error's intestate. Payment is refused by the company on the ground that the policies had expired prior to the death of the insured by reason of the failure to pay the second year's premiums thereon.

The applications for the insurance, dated December 12, 1893, were in writing, signed by the insured, and contain a request to "Please date policies same as applications."

The policies are dated December 18, 1893, but in plain type on their face, among other things, recite that:

> "This contract is made in consideration of the written application for this policy * * * and in further consideration of the sum of twenty-one dollars and — cents to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy."

The policies were tendered to and accepted by the insured on or about December 25, 1893, when the first year's premiums were paid in advance, as required. The premiums for the second year were not paid when due, nor have they since been paid or tendered.

The insured died on the morning of January 18, 1895.

If the premium-due date recited in the policies, namely, December 12, bound both parties to the contract, the insurance had expired prior to the death of the insured, and the judgments of both the circuit court and circuit court of appeals were correct.

The plaintiff in error seeks to avoid the effect of the plain terms of the written contract by showing:

> 1st. That the request "Please date policy same as application" was written into the application by the company's agent for his own benefit after the applica-

tion had been signed by deceased and without his assent or knowledge.

2d. That the applications for the insurance were signed by the insured "in the belief that if he accepted a policy of insurance upon his life, from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed since the last payment of the annual premium." * * *

3d. That it was expressly agreed by the agent and the deceased at the time of signing the applications that the first premiums should be paid upon the delivery of the policies, and the contracts of insurance were not to take effect until the policies had been delivered; and the policies were delivered to the deceased on or about December 26, 1893, when he accepted them and placed them away without reading them.

5th. That at the time of the delivery of the policies and before the first premiums were paid the insured "asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him."

Plainly stated, the ultimate question involved in the case is whether, in the absence of fraud, as to which there is neither charge nor proof, a written contract of insurance, plain and specific in its terms, accepted and retained by the insured in his personal possession for more than a year prior to his death, shall be effective in a court of law according to its terms, or shall be reformed in such court, at the instance of the personal representatives of the insured, so as to accord with the

"belief" of the deceased as to the legal effect of such terms. It does not appear that the company was, directly or indirectly, actually or presumptively, advised as to the character or existence of such "belief;" which "belief," assuming it to have existed as found, depended for its existence upon alleged verbal statements of the soliciting agent made prior to or contemporaneously with the delivery of the contracts; which statements the agent had no authority to make, the want of such authority having been directly brought to the attention of the insured at the time he signed the applications for the insurance.

STATEMENT OF CASE.

The policies are dated December 18, 1893, and contain in clear type, on the first page, the following:

> "This contract is made in consideration of the written application for this policy, and of the agreements, statements, and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and — cents, to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of the policy."
>
> "The benefits and provisions placed by the company on the next page are a part of this contract, as fully as if recited over the signature hereto affixed.'

Among the benefits and provisions so referred to are the following (pp. 8, 9):

> *Powers not delegated.*—"No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a

premium, to waive any forfeiture, or to bind the company by making any promise or making or receiving any representation or information. These powers can be exercised only by the president, vice-president, second vice-president, actuary or secretary of the company, and will not be delegated."

Payment of premiums.—"All premiums are due and payable at the home office of the company, unless otherwise agreed in writing * * * If any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall remain the property of the company."

Grace.—"After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5 per cent. per annum for the number of days during which the premium remains due and unpaid. During the said month of grace, the unpaid premium with interest as above, remains as indebtedness due the company, and in the event of death during said month, this indebtedness will be deducted from the amount of the insurance."

Attached to each policy at the time of its delivery and expressly made a part thereof was an abstract of the application for the insurance which had been signed by the insured, and which contained in the body thereof, above his signature, among other things not material here, the following (p. 11):

"10. Sum to be insured $5,000.
Five policies of $1,000 each.
Please date policy same as application.
Premium payable { Annually / Semi-annually / Quarterly

"11. I hereby agree as follows * * *

"2. That inasmuch as only officers at the home office of said company, in the city of New York, have authority to determine whether or not a policy shall issue on any application and as they act on the written statements and representations referred to, no statements, representations, promises or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, promises or information be reduced to writing and presented to the officers of said company, at the home office in this application. * * *

"4. That any policy which may be issued under this application shall not be in force, until the actual payment to and acceptance of the premium, by said company, or an authorized agent, during my lifetime and good health."

On or about the 26th day of December, 1893, the policies were tendered to the insured by the company's agent and, the specified premiums in advance having been paid, the policies were accepted by the insured and placed away without having been read by him, "THOUGH HE HAD FULL OPPORTUNITY FOR READING THEM, AND THE AGENT DID NOT IN ANY WAY ATTEMPT TO PREVENT HIM FROM READING THEM" (p. 54).

Not later than November 17 1894, in accordance with the requirements of the laws of the State of New York, notice was sent to the insured of the coming due of the second premiums on the policies (p. 54), and on the 11th or 12th of December, 1894, an agent of the company, having in possession properly executed renewal receipts, called on the insured to collect said premiums (p. 54). At that time the insured de-

clined to make the payments, "saying that he had seen other policies which promised better results, and that he did not think he would renew the insurance in the defendant company." Thereupon the agent "stated that as * * * she understood it, the grace on the second premiums would expire January 11th, and the insured said if he concluded to keep any of the insurance he would call and pay for it before the grace expired" (pp. 54, 55).

The insured died on the morning of January 18, 1895, without having paid the second-year premiums. Proofs of death having been furnished by insured's administrator, coupled with a demand for payment of the insurance, but without payment or tender of the second-year premiums, the company declined to pay, on the ground that the policies had lapsed and were not in force at the death of the insured, by reason of his failure to pay the second-year's premiums (pp. 55, 56).

Suit was brought by the administrator of the insured, in the district court of Iowa in and for Woodbury county (p. 1), and was removed therefrom, on the petition of the defendant company, into the circuit court of the United States for the northern district of Iowa, western division, on the ground of diverse citizenship (p. 15).

The declaration or petition, as it is called, contains three counts, each of which avers the application for and issuance and delivery of the policies sued upon, and refers to a copy of the policies and the applications filed therewith, marked Exhibit "A," and made a part of each count.

Count *1* sets forth the provisions of the policies to the effect that they were not to be in force "until the actual de-

mand and acceptance of the first premium by the company or its authorized agent;" and also that after the policies had been in force three months a grace of one month was to be allowed in the payment of subsequent premiums, subject to an interest charge of 5 per cent. per annum for the number of days for which the premium remained due and unpaid, and avers the payment of the first premium on or about December 25, 1893, and the death of the insured on the morning of January 18, 1895.

Count *II* avers that the written applications for the insurance were made December 12, 1893; that after the applicant had signed the same, and without his knowledge or consent, the agent of the company who solicited the taking of the policies wrote into the respective applications the words "Please date policy same as application;" that the company executed said policies on December 18, 1893, and delivered same to the insured on December 25, 1893, &c., as in count *I*, (pp. 3, 4).

Count *III* sets out the making of the written applications for the insurance December 12, 1893; the signing of the policies by the company December 18, 1893, and their delivery to the insured December 25, 1893, and avers that—

> "said policies continued in force from the 25th day of December, 1893, for thirteen (13) months by reason of the payment of one year's premium, and by reason of the provisions and conditions of said policies, providing for one month of grace, and by reason of the understanding of said parties, that said policies, by the payment of said premiums, as hereinbefore stated, would be in force for thirteen (13) months, from the 25th day of December, 1893," &c.

substantially as in count *I* above.

The company admitted the issuance and delivery of the policies as stated and the acceptance of the first year's premiums; averred the giving of notice in advance under the New York statutes of the coming due of the second year's premium on said policies, which notices contained the statement that said policies would be forfeited if the premiums were not paid when due; that the plaintiff had received and accepted said policies during his lifetime and held them in his possession for a long time, and that by reason of such acceptance and retention by the insured the plaintiff was estopped from denying the date of the policies or claiming that said policies should have a different date from the application, and from claiming that the words "Please date policies same as application" were not in the application when the insured signed the same (pp. 20, 21).

The defendant, by an amendment to its answer (p. 23), further denied that there was any understanding or agreement between the parties that the policies should be in force, or that the premiums should become due at any other time, manner, or place than as stated and expressed in said policies, and also denied that there was any understanding or agreement that the policies should be in force or binding for thirteen (13) months from the 25th day of December, 1893, or any other time than that stated and expressed in the policy, and further averred that the applications signed by the insured and the policies accepted and retained by him contained the provision that "no agent has power in behalf of the company to make or modify this or any other contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise or making or receiving any represen-

tation or information. These powers can be exercised only by the president, vice-president, second vice-president, actuary or secretary of the company, and will not be delegated."

After further amendments to the pleadings (pp. 26–30) the case came on for trial, and, a jury having been waived in writing (p. 31), the case was tried to the court.

The court made and filed eighteen (18) findings of fact (pp 52–56) and entered judgment thereon in favor of the defendant company (p. 56).

To review such judgment plaintiff sued out a writ of error from the circuit court of appeals for the eighth circuit, where the case was heard before Caldwell, Sanborn, and Thayer, circuit judges, and the judgment of the lower court was affirmed by a majority vote, Caldwell, J., dissenting.

The plaintiff in error, to recover, relied upon the following findings of fact made by the trial court, viz:

That the insured signed the application for the policies;

> "In the belief that if he accepted a policy of insurance upon his life from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed since the last payment of the annual premium" (p. 53).

and that the words—

> "Please date policy same as application"

were written into the applications by the company's agent for his own benefit, after the signing thereof by McMaster; and that—

"it does not appear that Frank E. McMaster ever knew that these words had been written into the application, and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company and was acted upon by the company" (p. 53).

"9th. The five policies enclosed in envelopes on or about December 26, 1893, were taken by F. W. Smith, the agent of the defendant company, to the office of Frank E. McMaster (the insured), who asked the agent if the policies were as represented, and if they should insure him for the period of thirteen months, to which the agent replied that they did so insure him, and thereupon McMaster paid the agent the full first annual premium, or the sum of twenty-one dollars on each policy, and without reading the policies, he received them and placed them away."

"The agent did not in any way attempt to prevent McMaster from reading the policies and he had the full opportunity for reading them, but in fact did not read them, and accepted them on the statement of the agent of the company, as hereinbefore set forth" (p. 54).

"14th. That the action of Frank E. McMaster shows, and the court so finds the fact to be, that the said McMaster believed that the policies issued to him by the defendant company would continue in force for the period of thirteen months from the date of the policies," * * * (p. 55).

During the pendency of this action at law the plaintiff in error filed a bill in equity against the defendant company to require it to reform the written policies so as to make them accord with the "belief," but such relief was denied by

the United States circuit court of appeals for the eighth circuit and the bill was dismissed.

New York Life Ins. Co. *vs.* McMaster, admr., 87 Fed. Rep., 63.

An application to this court for a writ of certiorari to review that decree was also denied.

McMaster, admr., *vs.* New York Life Ins. Co., 171 U. S. 687.

ARGUMENT.

Upon the facts as found by the trial court the concurring judgments of that court and the circuit court of appeals were clearly right.

The case discloses a bald attempt to overcome the plain terms of a written contract by proof of verbal statements and representations made during preliminary negotiations or contemporaneously with the delivery and acceptance of the written contract itself, by an agent of limited powers and authority; there being no proof tending to disclose fraud or the existence of a mutual mistake on the part of the parties to instruments sued on, and it being expressly stipulated, both in the preliminary application and the contract, that such statements or representations, if made, should not be binding upon the company unless brought to its notice in writing.

It is an attempt to enfore the *obligation* of a written contract while admitting non-performance of its conditions and in contravention of its plain terms.

The facts relied on by the plaintiff in error to overcome the judgments of the lower court are immaterial in law,

and the testimony tending to prove them should have been excluded.

It is not disputed that the deceased applied to the company for insurance on his life, and that pursuant to such application the policies in suit were issued and accepted by the insured.

If the terms of the policies as written are binding upon the insured and his legal representatives, it is plain that no recovery against the company can be had in law or equity.

If the terms of the policies as written by the company and accepted by the insured are not binding upon the latter and his legal representatives, it would seem to be equally plain that there does not exist any contract of insurance that ought to be or can be enforced against the company. If the policies do not represent the contracts between the company and the insured, there was no contract between them, for it is undisputed that the only contract tendered by the company is that embraced within the four corners of the policies themselves. At most the company would be liable but for the return of the premiums received by it.

The trial court made eighteen (18) findings of fact; of these, those numbered 1, 2, 3, 5, 8, 10, 11, 15, 16, 17, and 18, eleven in all, are accepted by both parties to the suit and are relied upon by the defendant in error to sustain the concurring judgments of the lower courts.

Those numbered 4, 6, 7, 9, 12, 13, and 14 are deemed to be immaterial by the defendant in error, but are relied upon by the plaintiff in error and petitioner to secure a reversal of the judgments complained of.

It seems unnecessary to consume time and space in discussing the first group of findings. They are all pertinent to the issues raised by the pleadings.

Examining the findings embraced in the second group *seriatim:*

The 4th finding recites that the deceased signed the application for the insurance in reliance upon the terms of the "grace" provision, "and in the belief that if he accepted a policy of insurance * * * the company could not assert the right of forfeiture until thirteen months had elapsed since the last payment of the annual premium."

Whatever may have been the source of such belief—as to which the findings make no disclosure—the mistake would appear to have been one of law, involving as it did the construction of the contents of written instruments.

The "belief" does not appear to have been induced by the deceit of any person in the employ of the company, and at best it but constituted a mistaken idea that could and would have been dissipated by ordinary care or inquiry.

Prior to the delivery of the policies, no contractual relation existed between the company and the insured, and the former can hardly be held to respond to obligations it never assumed simply because the latter, who accepted and retained the instrument by which their respective rights and obligations were intended to be measured, was possessed of an undisclosed "belief" that the company would be bound otherwise than as therein set forth.

If such "beliefs," undisclosed on the one hand and unsuspected on the other, are to be projected into the terms of written contracts so as to control their operations, then the

whole body of law as to the binding effect of written instruments must be rewritten.

Upon the delivery and acceptance of the policies the contractual relations of the parties, their rights and reciprocal obligations, became defined thereby.

That parties to written instruments, while contracting about the same thing, formed different ideas or untrue conclusions as to the ultimate effect of the terms of the instrument in their relations to the subject-matter of the contract is no ground for relief against the effect of such terms as written if they be plain and unambiguous, unless the mistake be mutual.

A contract may be reformed in equity where an item of the preliminary oral agreement is not embodied in the written instrument through the fraud of one or the mistake of both of the parties to it; but the oral agreement and the fraud or the mutual mistake must first be clearly proved. Here no such preliminary *agreement* is set up. The plaintiff in error relied for relief solely upon the "belief" of one of the parties to the written instruments, and that a "belief" formed prior to the execution of the writing, which would have been dissipated by an inspection of the instrument itself.

The 7th finding is but declarative of one of the terms of the contracts as written, it being embodied both in the application and the policies themselves.

The 6th and 9th findings are particularly relied upon to secure a reversal and induce judgment against the company.

By the terms of the policies the second premiums become

due and payable December 12, 1894, and in default of payment within one month thereafter—that is, on or before January 12, 1895—the insurance lapsed.

To overcome this result, it is asserted by plaintiff in error and found as a fact by the trial court that the request "Please date policy same as application," upon which the company acted in making the second premiums fall due on December 12, was written into the application by the agent (Smith) for his own benefit, after the signing thereof by the insured and without his knowledge or consent, and that he, the insured, had no knowledge of such interpolation when the applications were forwarded to the home office and were there acted upon by the company.

Assuming the interpolation of these words to have been material in shaping the terms in which the policies were expressed, how does this affect the relations between the company and the insured or his legal representatives? It is not suggested that the company had knowledge of the fact that the words had been so interpolated, and it would seem to be unnecessary to argue the proposition that the agent had no authority from the company to falsify or forge applications for insurance. If there be ground for complaint it would seem to be true that the company, as well as the applicant, was imposed upon by the agent's unauthorized act. In such a case, assuming both parties to have acted in good faith, justice could at most but require the return of the premiums paid.

But is the case so favorable to the insured? He received the policies which had been issued in strict accord with the applications as received by the company, and placed them away for safe keeping. A single glance at any one of

the policies, each of which had a copy of the application annexed to it, would have disclosed the imposition, if such it was, that had been practiced both upon himself and the company by the agent, and if he had thought the matter of sufficient consequence it would have been his duty to bring it to the attention of the company without delay. It was his duty to examine the policies to see that they embodied the agreement between the agent and himself. The failure so to do was gross negligence.

Where an agent is apparently acting for his principal, but is really acting for himself or third persons, there is no agency in respect to that transaction. The finding of the trial court is specific, and to the effect that the interpolated request was inserted by the agent for his personal advantage. The fraud or imposition, if it be such, could not have been consummated by the agent alone. The assistance of the insured in some capacity was necessary. If upon delivery of the policies he became informed of the interpolation in the application and remained silent, he acquiesced in it. If he did not so inform himself, it was because of his own negligence, and that would equally bar a recovery in this action.

He could not hold the policies without approving the action of the agent and thus acquiescing in it. The retention of the policy was an approval of the terms of the applications as submitted to the company and of the terms of the policies as issued thereon. The consequence of that approval, after his death, cannot be avoided.

New York Life Ins. Co. *vs.* Fletcher, 117 U. S., 519.

But it is sought to overcome this result by the suggestion that when the policies enclosed in envelopes were handed to

the insured by the agent, Smith, the latter, in answer to an inquiry by the insured as to whether "they would insure him for the period of thirteen months," replied "that they did so insure him," and thereupon the insured paid the premiums, "and without reading the policies, he received them and placed them away."

In this connection it is to be noted that the trial court found that—

> "The agent did not in any way attempt to prevent McMaster from reading the policies and he had the full opportunity for reading them, but accepted them on the statement of the agent of the company as hereinbefore set forth."

The authority of the agent to make representations in connection with any insurance effected by him was expressly limited, and the existence of such limitation was brought to the knowledge of the applicant both by the terms of the application as signed by him and of the policy as received and retained by him.

That it is competent for any party, corporation, or individual, employing an agent in the negotiation of contracts, whether of insurance or otherwise, to limit his powers, and if the limitation be brought to the knowledge of the other contracting party, to bind him thereby, can hardly be doubted; and, as in this case, such limitations upon the agent's authority were expressly set forth both in the applications and the policies, and were thereby made a part of the contracts forming the basis of this suit, they should be given full effect. As it was distinctly declared in both papers that no statements, representations, promises, or information made or given by or to the person soliciting or taking

the application for the policy shall be binding upon the company or in any manner affect its rights unless such statements, representations, promises, or information be reduced to writing and presented to the officers of the company at the home office, it is difficult to perceive upon what ground the verbal representations of the agent and the understandings of the insured supposed to have resulted therefrom, and embodied in findings 4, 7, and 9, but not reduced to writing and presented to the officers of the company at the home office, can be deemed to operate as an estoppel against the company or to be in anywise material to the real issue involved in this suit.

In Union Mutual Life Insurance Company *vs.* Mowry (6 Otto, 544) the insured failed to pay the second-year premium when due, and shortly afterwards died. Thereafter the premium was tendered to the company, which refused to receive it on the ground that the policy had lapsed. It was sought to overcome the effect of the failure to pay the premium according to the terms of the policy by showing that the agent who induced the application for the insurance represented that the company would give notice in season to pay them, and that no such notice was given; but this court, in disposing of that contention, said:

> "All previous arrangements were merged in the written agreement. The understanding of the parties as to the amount of the insurance, the conditions upon which it should be payable and the premium to be paid, was there expressed, for the very purpose of avoiding any controversy or question respecting them." * * *

"If, by inadvertence, or mistake, provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief. But, until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company."

"The policy shows on its face that the authority to the agent was limited to countersigning it before delivery and to receiving the premiums. But even if the agent had possessed authority to make an insurance for the company and he made the agreement pretended, still the assured was bound by the terms of the policy subsequently executed and accepted by him."

As parol evidence is not admissible to show that a written contract varies from the previous agreement of the parties (La Farge *vs.* Rickert, 5 Wend., 187; 21 Am. Dec., 208), so also is parol evidence of a contemporaneous representation as to the legal effect of its contents likewise to be excluded.

It must presumed that McMaster read the applications and the policies and was fully cognizant of the limitations on the authority of the agent therein expressed.

Glove, &c., Ins. Co. *vs.* Wolf, 95 U. S., 329.

Ins. Co. *vs.* Norton, 96 U. S., 240.

The failure to read the policies, if in fact such failure continued after the date of their receipt, was gross negligence. It was the duty of the insured to read and acquaint himself with their contents, in order that any error or mistake or divergence from the terms of the application appearing in them might promptly be brought to the attention of the

company and corrected. By failing to report any such the insured must be presumed to have accepted the policies in accordance with their terms, and to have agreed that they should remain as the basis of the contract of insurance.

Insurance Co. *vs.* Fletcher, 117 U S., 519.

But in the case at bar we are not driven to rely upon presumptions alone. It appears that the attention of the insured was directly called to the date of expiration of these policies not once, but twice: First, by written notice sent not later than November 17, 1894, "in accordance with the requirements of the statutes of the State of New York" (Finding 10th, p. 54); second, by personal solicitation of one of the company's collecting agents, Miss Ball, "who on the 11th or 12th day of December, 1894, called on said McMaster for payment of the premiums in question, at which time McMaster declined making payment thereon, saying that he had seen other policies which promised better results, and that he did not think he would renew the insurance in the defendant company." Miss Ball told him that, "as she understood it, the grace on the second premiums would expire January 11th, and McMaster said if he concluded to keep any of the insurance, he would call and pay for it before the grace expired" (Finding 11th, pp. 54, 55).

In the face of such facts, how is it possible to accept the conclusion expressed in the 14th finding (p. 55), that "McMaster believed that the policies issued to him by the defendant company would continue in force for the period of thirteen months from the date of the policies."

Whatever "belief" he may have had on this point in the beginning can hardly be assumed to have continued after

the receipt of the notice of November 17, 1894, and the visit of Miss Ball on December 11 or 12. If he had not read the policies before such occurrences, as it was his duty to have done, he surely will not be excused for continued negligence in such a vital particular, and his failure thereafter to complain to the company or any one else should be deemed to evidence an acquiescence in the terms of such policies, at least from that late date.

In the absence of any remonstrance or complaint, after the date of expiration had been thus specifically brought to his attention, is it for a court of law to say that he did not acquiesce therein?

Findings 12 and 13, relating as they do to transactions and conversations had with persons not in anywise connected with the defendant company and neither directly or indirectly brought to its knowledge, would seem to be without bearing upon the issues involved in the suit, and consequently to require no further notice.

It is respectfully submitted that the judgments both of the circuit court and circuit court of appeals should be affirmed.

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No. 199. 29

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Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed April 15, 1901.

No. 199.

FRED A. McMASTER, ADMINISTRATOR OF THE ESTATE OF F. E. McMASTER, DECEASED, PLAINTIFF IN ERROR AND PETITIONER,

vs.

THE NEW YORK LIFE INSURANCE CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

ADDITIONAL MEMORANDUM ON BEHALF OF DEFENDANT IN ERROR, SUBMITTED BY LEAVE OF COURT.

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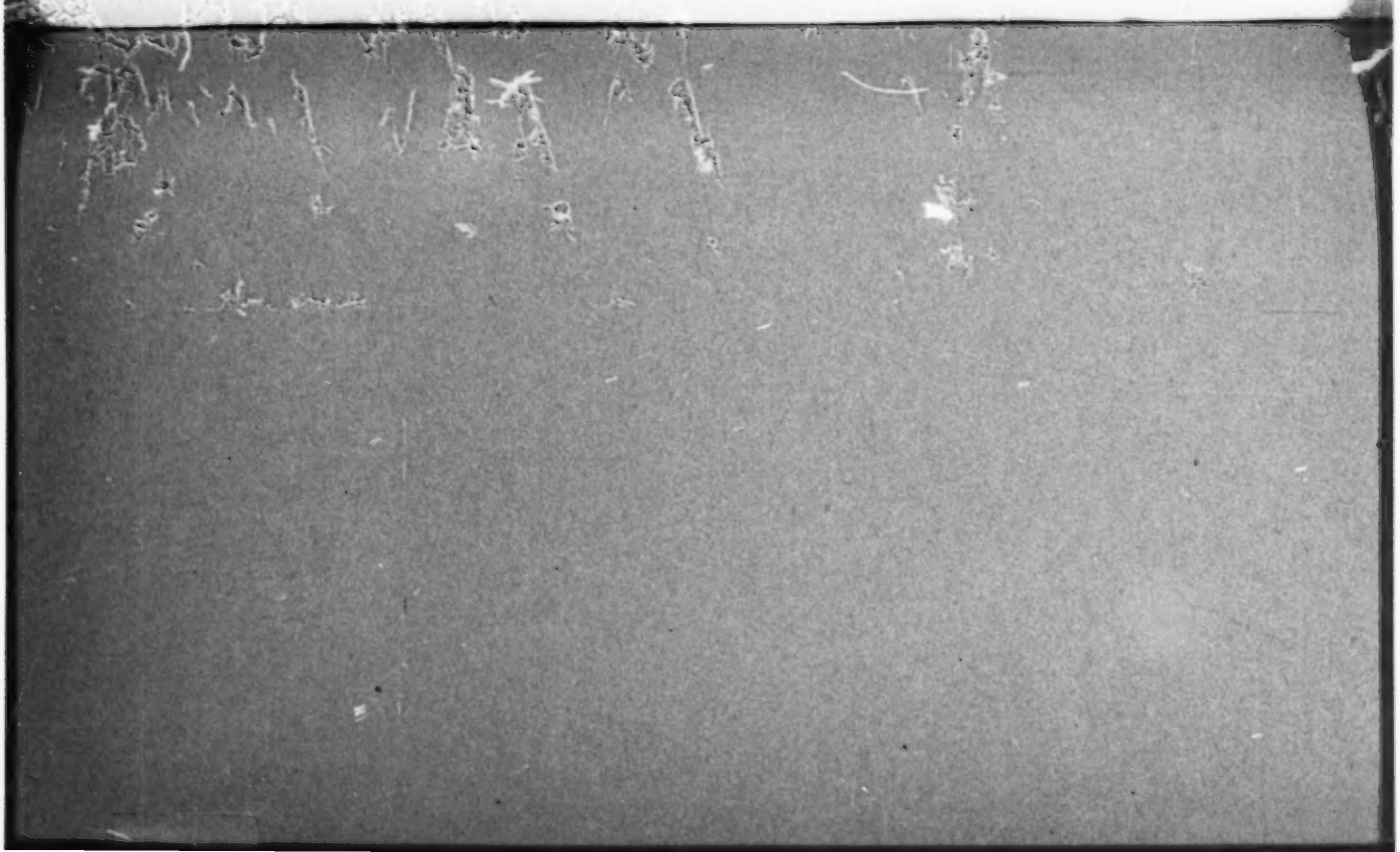

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Additional Memorandum on Behalf of Defendant in Error, Submitted by Leave of Court.

Throughout the progress of this cause the contention on behalf of the plaintiff has ever been that the insured had bought and paid in advance for thirteen months' insurance from December 26, 1893, the date the policies were delivered and the first annual premiums been paid.

This contention is based upon the seventh finding of fact, to the effect that by express understanding between the

agent and the applicant "it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies, and that the contract of insurance was not to take effect until the policies were delivered," taken in connection with the "grace" provision of the policy, which declared that after the policy had "been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5 per cent. per annum for the number of days during which the premium remains due and unpaid."

Plaintiff's deduction from these two provisions is that under the contract of insurance the assured was guaranteed thirteen full months of insurance from and after the date the policies "went into force" by the concurrent acts of delivery and payment of the first premiums.

That this deduction is fallacious necessarily appears when the seventh finding of fact is considered in connection with the WHOLE policy, which was accepted and retained by the assured for more than a year before his death.

The policies sued upon are not ordinary life policies which require premiums to be paid annually in advance by the insured so long as he shall live. They are what are known as "20 accumulation policies" (R., 11, Q. 9, A. B. C.) and provide that "in consideration" of the sum of twenty-one dollars, to be paid in advance, *and of the payment of a like sum on the twelfth day of December, in every year thereafter during the continuance of this policy*" * * * "IF THE INSURED IS LIVING ON THE 12TH DAY OF DECEMBER, IN THE YEAR NINETEEN HUNDRED AND THIRTEEN, ON WHICH

DATE THE ACCUMULATION PERIOD OF THIS POLICY ENDS, AND IF THE PREMIUMS HAVE BEEN PAID IN FULL TO SAID DATE, THE INSURED SHALL BE ENTITLED TO ONE OF THE SIX BENEFITS FOLLOWING:" * * * (R., 6, 7.)

The insured is required to notify the company in writing prior to the end of the accumulation period, which benefit is selected, and in the absence of such notification the apportioned dividend is to be applied to the purchase of an annuity (R., 7).

The policy also provides that "the company will make advances as loans upon this policy at the fifth, tenth, and fifteenth anniversaries of the insurance" under certain conditions thereinafter specified (R., 7).

It appears, therefore, that the kind of insurance applied for by the deceased, and furnished by the company, and now here sued upon, is insurance of a special class, requiring the payment of premiums but for a special and limited period, and guaranteeing to the insured during the life of the policy and in the event of his outliving the full period, his choice of several desirable benefits.

In such class of insurance, as must be apparent, the main considerations are two: 1st. Payment of a specified amount in premiums in a specified number of installments—in the case at bar, twenty (20)—and the continuation of the life of the insured to the expiration of the accumulation period, the insured having always the further advantage that in the event of death within the accumulation period the face of the policy is to be paid to his executors, administrators, or assigns, provided, of course, that the premiums have been paid as the policy requires.

In this class of insurance the premium-due date controls the date of expiration of the accumulation period. The earlier the former, the sooner will the latter occur. For the insured, who looks forward to the enjoyment of the benefits which the policy promises at the expiration of the designated period, the sooner the period expires the better.

In the average human being hope of prolonged life ordinarily exceeds apprehension of early death, and so in applying for and accepting insurance of the class here sued upon the so-called antedating of the premium due-date might well be, and indeed by the insured here might well have been, regarded as a distinct advantage.

That such earlier maturing of the accumulation period was an advantage to the insured cannot be denied. That he would have profited by the date of earlier maturity had he outlived the accumulation period cannot be gainsaid. Since, then, he accepted and retained in his immediate possession, without complaint or protest, the policies which guaranteed to him such advantage and profit, with what patience can his personal representative be heard to argue that the making of the premium due-date in the policy to accord with the date of the application for the insurance necessarily worked an injury to the insured? Is it not rather to be presumed that the insured weighed the disadvantage of the earlier payment of the second annual premium against the advantage of the earlier maturity of the accumulation period and found the latter to outweigh the former?

Viewed in this aspect, neither the policy nor any proper construction of the "grace" provision can reasonably be accepted as guaranteeing to the insured on the payment

of the first premium thirteen full months of insurance from the date "the policies went into force." On the contrary, full effect will be given both the agreement of the parties as expressed in the seventh finding of fact and the policy itself by holding that all that the policies either guarantee or require is that in the event of the failure of the insured to pay subsequent premiums on the day specified in the body of the policy the insured should be permitted to pay same at any time within one month thereafter upon the addition of interest at the rate of 5 per cent. per annum.

In Methvin *vs.* Fidelity Mutual Life Association of Philadelphia, 61 Pac. Rep., p. 1112 (California), the policy of life insurance sued on was dated July 30, 1895, and provided that it should not be binding until delivery and payment of the first premium, subsequent premiums to be paid quarterly. Policy was delivered and first premium paid September 3, 1895. The second quarterly premium, which, according to the terms of the policy, was payable October 30, 1895, was not paid, and the insured died in November.

Upon suit brought, the supreme court of California, in department, three judges sitting, held that the policy went into effect (force) September 3, when the first premium was paid, and that—

> "when the insured received his policy and paid his quarterly premium he was insured for three months from September 3d, the date when the policy went into force and effect. The insured died in November, 1895, and we see no reason why his policy of insurance was not alive and in full force at that time."

Judgment went for plaintiff. Upon appeal to same court *in banc*, before seven judges, including the three who heard and determined the case in department, this judgment was unanimously reversed, the court saying in its opinion:

"The policy was executed, as appears on its face, July 30, 1895. Necessarily some little time must elapse between its execution in Philadelphia and delivery in Los Angeles which both parties to the contract of course well understood; and without the provision contained in the policy, that it would not be binding until delivered, the same result would have followed. The payments are expressly specified in the policy to be due and payable on or before the 30th day of July, October, January and April every year. * * * On the trial it was conceded that the second payment was not made, but it was contended that the payment of the first premium ran three months from the 3d day of September, instead of from July 30, 1895, as plainly declared in both the policy and the receipt for the first payment delivered with it."

and the failure to pay this second premium upon the day specified in the policy for its payment was held to end the plaintiff's suit.

In Bryan *vs.* National Life Ins. Ass'n, 21 Rhode Island, 149, the application for the insurance was signed March 18, 1890; the policy was issued and dated March 22, and required the monthly premiums to be paid in advance on the 15th of each month for a period of twenty (20) years.

Premiums were paid regularly, as specified in the policy, to and including December 15, 1891, when the last payment was made.

The insured died January 28, 1892. Suit was brought on the policy, and the defense was that the policy had lapsed for non-payment of premiums.

SEMMES, *J.*:

"Payment being required in advance, the payment made at its issue would go until the next pay-day should come. The fact that this would be three days less than a month does not affect the case since the payments, being parts of a fixed total, were not payments for a month, but payments due on a particular day of a month."

So in the case at bar, the payment of the first premium made upon delivery of the policy being but a part of a fixed and definitely ascertained whole, viz., one-twentieth of the entire amount of premiums required by the policy to be paid—carried the insurance to the next pay-day and one month beyond. The fact that the next pay-day occurred less than twelve months after such payment does not alter the case, for the payment made was not a payment for such period, but merely one of twenty similar payments which by the terms of the policy were required to be made on a designated day in each and every year of the accumulation period.

And this principle has heretofore been established by this court in Insurance Co. *vs.* Statham (93 U. S., 24), where Mr. Justice Bradley, speaking for the court, said:

"It has been contended that the payment of each premium is the consideration for insurance during the next following year, as in fire policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten or twenty annual installments. Such installments are clearly not intended as the consideration for the respective years in which they are paid; for, after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each installment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the

whole life. The value of assurance for one year of a man's life when he is young, strong and healthy, is manifestly not the same as when he is old and decrepit. There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid. This idea of assurance from year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance.

"But whilst this is true, it must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. * * * The insured parties are associates in a great scheme.

"This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for out of the coexistence of many risks arises the law of average which underlies the whole business."

* * * * * * *

"The case, therefore, is one in which time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence."

In the course of the argument in this court attention was called by Mr. Chief Justice to the table of guarantees appearing on page 10 of the record, which table appeared to have been calculated in a double aspect. In this connec-

tion it would seem not to be amiss to call attention to the fact the policies issued to the deceased and here sued upon are numbered 577,242, 577,243, 577,244, 577,245, and 577,246 respectively (R., 3), while the policy annexed to the declaration and containing the mixed table of guarantees above referred to, being Exhibit "A," is numbered 512,382.

It now appears that in addition to the policies above enumerated and here sued upon, other policies of the same general class had been issued to the insured, among them being policies numbered 512,380, 512,381, and 512,382. These policies having also lapsed, counsel for plaintiff appears to have preferred to append to his declaration as an exhibit the last-numbered policy rather than one of the policies sued on, having first duly altered the exhibit to correspond with the policies in suit. Either in making up the transcript of record for the circuit court of appeals or in the printing thereof, the alterations failed to be properly noticed, as appears from the certificate of the clerk of the circuit court of the United States for the northern district of Iowa and accompanying papers printed as an appendix to this brief.

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Frederic D. McKenney,
Of Counsel.

APPENDIX.

UNITED STATES OF AMERICA, } ss:
Northern District of Iowa, }

FRED. A. McMASTER, *Administrator of the Estate of Frank McMaster, Dec'd,*
vs.
NEW YORK LIFE INSURANCE COMPANY. } No. 217. Law.

I, A. J. Van Duzee, clerk U. S. circuit court for said district, do hereby certify that I have in my possession and charge all the papers in a certain action at law tried and determined in said court, in which Fred. A. McMaster, administrator, etc., was plaintiff and The New York Life Insurance Company of New York was defendant; that the paper hereto attached, marked Exhibit "A," I copied from and is a portion of Exhibit "A" attached to the original petition in the law action above described; that the same is true and correct in each particular and detail.

Witness my hand and official seal of said court hereto affixed this 28th day of March, A. D. 1901.

A. J. VAN DUZEE, *Clerk*,
[SEAL.] By J. H. BOLTON, *D'p'ty.*

"EXHIBIT A."

Benefits and Provisions Referred to in This Policy.

Non-forfeiture.

After this policy shall have been in force three full years, in case of non-payment of any premium subsequently due, and upon the payment within thirty days thereafter of any indebtedness to the company on account of this policy, and provided the policy has not been terminated by death within the month of grace allowed in the payment of pre-

miums (1) the insurance will be extended for the face amount, as provided in the table below, or (2) on demand made within six months after such non-payment of premium due, with surrender of this policy, paid-up insurance will be issued for the reduced amount provided in the said table; or (3) the policy will be reinstated within the said six months upon payment of the overdue premium with interest at the rate of five per cent. per annum, if the insured is shown by evidence satisfactory to the company to be in good health.

Table of guarantees, if payment of premiums is discontinued,

Provided there is no indebtedness against the policy.

(Pursuant to the insurance law [chapter 690, Laws of 1892] of the State of New York.)

If the premiums are paid—	(1) The insurance of $1,000 (without participation in profits) will be extended —	or (2) The policy may be converted into non-participating, paid-up insurance—
To December 12, 1896..	To March 12, 1899....	Of $64
" " " 1897..	" " " 1901....	" 84
" " " 1898..	" April " 1903....	" 105
" " " 1899..	" March " 1905 ...	" 126
" " " 1900..	" February " 1907...	" 147
" " " 1901..	" January " 1909...	" 169
" " " 1902..	" December " 1910 ..	" 190
" " " 1903..	" " " 1912....	" 212
" " " 1904..	" " " 1914..	" 233
" " " 1905.	" " " 1916...	" 255
" " " 1906..	" October " 1918 ..	" 276
" " " 1907..	" August " 1920 ...	" 298
" " " 1908..	" April " 1922 ..	" 319
" " " 1909..	" November " 1923...	" 340
" " " 1910..	" May " 1925 ..	" 361
" " " 1911..	" October " 1926...	" 382
8. " " " 1912..	" February " 1928....	" 403

Policies continued in force beyond the accumulation period will be entitled, in case of non-payment of any premium subsequently due, to extended insurance or reduced paid-up insurance on the same basis as that on which the above table is constructed. 2100.

STATE OF NEW YORK, *City and County of New York,* } ss:

Benjamin T. Wilcox, being duly sworn according to law, on his oath saith that he is the manager of the division of policy issues of the New York Life Insurance Company; that the division of which he has charge issues all the policies of the New York Life Insurance Company for the United States, and that all of the policies are prepared, drafted, and signed in his office; that in order to insert the non-forfeiture table and guarantees, pursuant to the New York insurance law, chapter 690 of the Laws of 1892, upon any policy which may be issued, such application is referred to the actuarial department of the company, and a table is prepared by such department, to be inserted in the policy to be issued.

That on December 18th, 1893, five policies were issued by the New York Life Insurance Company upon the life of F. E. McMaster, in the sum of one thousand dollars ($1,000) each, and bearing numbers 577, 242, '3, '4, '5, and '6, and that the application of the said F. E. McMaster for such policies was referred in the usual course to the actuarial department, and a table was prepared, called a non-forfeiture table and showing extended insurance or paid-up insurance, to which the said applicant might become entitled under the non-forfeiture law above referred to.

And deponent saith that the original table prepared by the actuarial department is hereto attached and made a part of this affidavit, and that the same was copied into each one of the policies issued upon the life of the said F. E. McMaster bearing the above numbers, and which are the policies now sued upon.

Deponent further saith that he has been shown a transcript of the record of the case of Fred. A. McMaster, administrator of the estate of F. E. McMaster, deceased, plaintiff in error, *vs.* New York Life Insurance Company, and has read Exhibit "A" contained on pages 6, 7, 8, 9, and 10 of said transcript, and that his attention has been particularly called to a table contained on page 10 of said record, purporting to give amounts of paid-up insurance and terms of extended insurance in case payment of premiums should be discontinued after three years; and deponent saith, to the best of his knowledge and belief, said table, so printed on said page

10, is incorrect, and is not the table which was contained in the said five policies when they were issued from the home office; and deponent further saith, that in the particulars in which said printed table, on page 10, differs from the original actuarial table appended to this affidavit, said printed table is incorrect, and in those respects is not a true copy of the policies which were issued by the New York Life Insurance Company.

Deponent further saith that the guarantees contained in said policies relate to the payment of premiums of the 12th day of December of each year, which is the date of the application for the insurance, and that it is the custom and usage of the New York Life Insurance Company to commence the insurance year on the date of the application, and to require payment of premium on each recurring anniversary of such date, for the reason that the rate of premium is based upon the age of the applicant, and the age is ascertained from the application.

BENJAMIN T. WILCOX.

Subscribed and sworn to this 19th day of March, 1901.

[SEAL.] R. A. CHICHESTER,
Notary Public, Kings Co.

Certificate filed in New York Co.

Life ordinary.	To be used in the home office only in connection with application of Mr. F. E. McMaster. Accumulation period ends Dec. 12, 1913. Guaranteed equity, $239.	No. 577,242. 577,243. 577,244. 577,245. 577,246. Amount, 5 pol., $1,000 e.
Note.—Strike out the rates not needed.	Loans... From 4th to 10th years, inclusive, $47 " 11th to 15th " " 102. " 16th to 20th " " 166.	Age, 26. Premium, $21 each.

This margin is reserved for binding and must not be written on.

All answers are required to be written in the spaces opposite the questions, and must not run over into subsidiary spaces.

Non-Forfeiture Table.

Pursuant to the insurance law (chapter 690, Laws of 1892) of the State of New York.

Dedell, B. H.

If the premiums are paid to—	The insurance of $1,000 will be extended without further payment of premiums to—	Or (subject to conditions above) the policy may be converted into a paid-up insurance without further payment of premiums for the amount of—
Dec. 12, 1896	M'ch 12, 1899	$64
" 1897	" " 1901	84
" 1898	Ap'l " 1903	105
" 1899	M'ch " 1905	126
" 1900	Feb'y " 1907	147
" 1901	Jan. " 1909	169
" 1902	Dec. " 1910	190
" 1903	" " 1912	212
" 1904	" " 1914	233
" 1905	" " 1916	255
" 1906	Oct. " 1918	276
" 1907	Aug. " 1920	298
" 1908	Ap'l " 1922	319
" 1909	Nov. " 1923	340
" 1910	May " 1925	361
" 1911	Oct. " 1926	382
" 1912	Feb'y " 1928	403

Examined.
W. —

STATE OF NEW YORK, } ss:
City and County of New York, }

W. H. Clapp, being duly sworn according to law, on his oath saith that he is the superintendent of the accumulation division of the New York Life Insurance Company, which division has charge of the preparation of non-forfeiture tables to be inserted in accumulation policies; that the table, partly printed and partly written upon yellow paper, attached to the affidavit of Benjamin T. Wilcox, is the original table, according to the knowledge and belief of deponent, which was prepared in his department for insertion in policies Nos. 577, 242, '3, '4, '5, and '6, on the life of F. E. McMaster, and that the terms of extended insurance therein stated and the amounts of paid-up insurance therein contained for one thousand dollars ($1,000), at age twenty-six, where the accumulation period ends December 12th, 1913, are correct.

W. H. CLAPP.

Subscribed and sworn to this 19th day of March, 1901.

[SEAL.] R. A. CHICHESTER,
Notary Public, Kings Co.

Certificate filed in New York Co.

Supreme Court of the United States.

No. 29.—October Term, 1901.

Fred. A. McMaster, Administrator of the Estate of F. E. McMaster, Deceased, Petitioner, *vs.* The New York Life Insurance Company. } On writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[October 28, 1901.]

This was an action brought by Fred. A. McMaster, administrator of the estate of Frank E. McMaster, deceased, against the New York Life Insurance Company on five policies of insurance of one thousand dollars each upon the life of Frank E. McMaster.

The applications were dated December 12, and the policies December 18, 1893. The premiums for a year in advance were paid, and the policies delivered December 26, 1893.

McMaster died January 18, 1895, and the defense was that the insurance had been forfeited by failure in payment of the second annual premiums on or before January 12, 1895, that is to say, within thirty days after December 12, 1894, when the company contended they became due.

The company alleged in a substituted and amended answer that the policies were executed and delivered December 12, 1893, and set forth:

"2. This defendant, for further answer, says that said application is dated the 12th day of December, 1893, and asked the issuing of five policies of $1000 each upon the life of the said Frank E. McMaster, deceased. Said application also contained a request that said five policies each should be issued, dated and take effect the same date as the application, namely, the 12th day of December, 1893, and said request was complied with, and the policies were so issued.

"This defendant grants to the insured in said defendant company a grace of one month on the payment of premiums, which extended the day of payment of premiums from December 12th, 1894, as in the policies issued to said Frank E. McMaster, deceased, late as the 12th day of January, 1895, but not later.

"3. This defendant, for further answer, says that payment of the premiums due upon said policies were not paid within the time prescribed as aforesaid, and that said Frank E. McMaster died on the 18th day of January, 1895, six days after said policies had lapsed and were forfeited for non-payment of premiums as required.

* * * * * *

"6. This defendant, further answering said petition, says that said application is a part of said policies, in each case, that said assured received

and accepted said policies during his lifetime and had them all in his possession for a long time, and was aware and knew, or could have known, the contents in each policy.

"That said assured had paid the premiums when said policies were delivered to him; that by reason of said assured's acceptance of said policies, his representative, the plaintiff herein, is estopped from denying the date of said policies or claiming that said policies should have a different date from the application, and is estopped for the reasons above stated from claiming that said words, to wit: 'Please date policy same as application' were not in said application when insured signed same, for by accepting said policies the assured waived said right to object, if said words were inserted, as alleged in petition after the signing of the application, which this defendant denies."

The case was tried by the Circuit Court without a jury; special findings of fact made; and judgment rendered in favor of defendant. 90 Fed. Rep. 40.

Plaintiff prosecuted a writ of error from the Circuit Court of Appeals and the judgment was affirmed. 99 Fed. Rep. 856. The writ of certiorari was then allowed.

Pending the trial below, plaintiff filed a bill in equity for the reformation of the policies, and the Circuit Court granted the relief prayed. 78 Fed. Rep. 33. On appeal this decree was reversed, 57 U. S. App. 638; and an application to this court for certiorari was denied. 171 U. S. 687. The Circuit Court of Appeals expressed the opinion in that case that no recovery could be had at law or in equity, and accordingly the Circuit Court in this case, although of opinion that plaintiff was entitled to recover, gave judgment for defendant.

Separate opinions were given by the judges of the Court of Appeals, Sanborn and Thayer, JJ., concurring in affirming, and Caldwell, J., dissenting.

The findings of fact by the Circuit Court were as follows:

"1st. The plaintiff, Fred A. McMaster, was when the suit was brought and is now, the lawfully appointed administrator of the estate of Frank E. McMaster, deceased, having been appointed administrator of the named estate by the probate court of Woodbury County, Iowa, and furthermore said plaintiff was, when this suit was brought and is now a citizen of the State of Iowa, and a resident of Woodbury County, Iowa.

"2nd. That the defendant, The New York Life Insurance Company was when this suit was brought and is now, a corporation created under the laws of the State of New York having its principal office and place of business in the city of New York in the State of New York, but being also engaged in carrying on its business of life insurance in the State of Iowa, and other States.

"3rd. That in December, 1893, F. W. Smith, an agent for the New York Life Insurance Company, residing at Sioux City, Iowa, solicited Frank E. McMaster, to insure his life in that company, and as an inducement to taking the insurance pressed upon McMaster the provision adopted

by the company and set forth in the circular issued by the company, and printed on the back of the policies issued by the company under the heading, 'Benefits and Provisions referred to in this Policy' in the following words: 'After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5 per cent per annum for the number of days during which the premium remains due and unpaid. During said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of the death during said month, this indebtedness will be deducted from the amount of the insurance.'

"4th. Relying on the benefits of this provision and in the belief that if he accepted a policy of insurance upon his life, from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed since the last payment of the annual premium, the said Frank E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on and attached to the petition, the same being made part of this finding of facts.

"5th. In the application when signed by Frank E. McMaster, it was provided that the amount of insurance applied for was the sum of $5000 to be evidenced by five policies for $1000 each, on the ordinary life table, the premium to be payable annually.

"6th. There now appears on the face of the application, interlined in ink, the words, 'please date policy same as application.' These words were not in the application when it was signed by McMaster, but after the signing thereof, they were written into the application by F. W. Smith, the agent of the New York Life Insurance Company, without the knowledge or assent of Frank E. McMaster, and were so written in by the agent in order to secure to the agent a bonus which the company allowed to agents for business secured during the month of December, 1893, and it does not appear that Frank E. McMaster ever knew that these words had been written into the application and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company and was acted on by the company.

"7th. By the express understanding had between F. W. Smith, the agent of the New York Life Insurance Company and Frank E. McMaster when the application for insurance was signed, it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies and that the contract of insurance was not to take effect until the policies were delivered.

"8th. The defendant company, at its home office in New York City, upon receipt of the application determined to grant the insurance applied for and issued five policies each for the sum of $1000 dated December 18th, 1893, and reciting on the face thereof that the annual premium on each policy was $21.00 and forwarded the same to its agent F. W. Smith, at Sioux City, Iowa, for delivery to Frank E. McMaster. These five policies are in the form of the one attached to the petition in this case, which is hereby made a part of this finding of fact, and each policy contains the recital: 'This contract is made in consideration of the written application for this policy, and of the agreements, statements, and warranties thereof, which are hereby made a part of this contract, and in

further consideration of the sum of twenty-one dollars and ——— cents, to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy.'

"9th. The five policies enclosed in envelopes on or about December 26th, 1893, were taken by F. W. Smith, the agent of the defendant company, to the office of Frank E. McMaster, who asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him and thereupon McMaster paid the agent the full first annual premium or the sum of twenty-one dollars on each policy and without reading the policies he received them and placed them away. The agent did not in any way attempt to prevent McMaster from reading the policies and he had the full opportunity for reading them, but in fact did not read them and accepted them on the statement of the agent of the company as hereinabove set forth.

"10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster, of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the State of New York.

"11th. The renewal receipts for the second annual premium on the five policies held by Frank E. McMaster, in the defendant company, were sent for collection to Mary A. Ball, at Sioux City, Iowa, who on the 11th or 12th day of December, 1894, called on said McMaster for payment of the premiums in question. At that time McMaster declined making payment thereon, saying that he had seen other policies which promised better results and that he did not think he would renew the insurance in the defendant company. Miss Ball told him the New York contracts had some nice provisions like thirty days of grace and loans, and in reply to an inquiry from McMaster, stated that his policies entitled him to the month's grace in the payment of the premiums, and that, as she understood it, the grace on the second premiums would expire January 11th and McMaster said if he concluded to keep any of the insurance he would call and pay for it, before the grace expired.

"12th. That in November or December, 1894, Frank E. McMaster was examined for the purpose of obtaining life insurance by the agents of the Union Central Insurance Company, it being understood between the parties that the policies were not to issue until in January, 1895, and it being the purpose of McMaster to take one or two thousand dollars insurance in the Union Central Company, at the expiration of his insurance in the defendant company, but also to continue part of the policies held in the defendant company.

"13th. That on or about January 15th, 1895, the agent of the Union Central Company, meeting McMaster on the street in Sioux City, told him the policies issued by the Union Central Company had been received and in reply McMaster said: 'All right, just hold them, there is no hurry about them,' and in the same conversation he stated that he had other insurance, referring to the policies in the defendant company.

"14th. That the action of Frank E. McMaster shows, and the court so finds the fact to be, that the said McMaster believed that the policies issued to him by the defendant company would continue in force for the period of thirteen months from the date of the policies and his action with

respect to the policies in the defendant company and the proposed insurance in the Union Central Company was based upon and governed by this belief on his part.

"15th. That Frank E. McMaster died at Sioux City on the morning of January 18th, 1895.

"16th. That up to the time of his death, the said Frank E. McMaster had not paid the second year's premiums on the policies issued to him by the defendant company, nor have the same been paid since his death, nor had the said McMaster received or paid for the policies issued by the Union Central Company, and the same had not been delivered or become effectual.

"17th. That due and sufficient notice, and proofs of the death of said Frank E. McMaster were immediately sent to and received by the defendant company, and due demand for the payment of the five policies sued on was made by the plaintiff, as administrator of the estate of Frank E. McMaster, and refused by the defendant company on the ground that the policies in question had lapsed and were not in force at the time of the death of said Frank E. McMaster, by reason of the failure to pay the second year's premiums coming due on said policies.

"18th. That the defendant company has not paid said policies or any part thereof, and assuming the same to be valid, there is due thereon November 1, 1898, the sum of (85,965) five thousand nine hundred and sixty-five dollars, after deducting from the face of the policies the amount of the second premiums with interest thereon to March 14, 1895."

The policies were dated December 18, 1893, and provided:

Annual Premium $21.00.

"This contract is made in consideration of the written application for this policy, and of the agreements, statements and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and ——— cents, to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy.

Incontestability.

"After this policy shall have been in force one full year, if it shall become a claim by death the company will not contest its payment, provided the conditions of the policy as to payment of premiums have been observed.

"The benefits and provisions placed by the company on the next page, are a part of this contract, as fully as if recited over the signatures hereto affixed."

"Benefits and provisions referred to in this policy.

Benefits at end of Accumulation period.

"If the insured is living on the 12th day of December in the year nineteen hundred and thirteen, on which date the accumulation period of this policy ends, and if the premiums have been paid in full to said date, the insured shall be entitled to one of the six benefits following:" [cash value; annuity; paid up policy, &c., &c.] If the insured made no selection dividends were to be apportioned as provided.

"(Any indebtedness to the company, including any balance of the current year's premium remaining unpaid, will be deducted in any settlement of this policy or of any benefits thereunder.)

Powers not Delegated.

"No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise or making or receiving any representation or information. These powers can be exercised only by the president, vice president, second vice president, actuary, or secretary of the company, and will not be delegated.

Payment of Premiums.

"All premiums are due and payable at the home office of the company, unless otherwise agreed in writing, but may be paid to agents producing receipts signed by the president, vice president, second vice president, actuary or secretary, and countersigned by such agent. If any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall remain the property of the company.

Grace.

"After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5% per annum for the number of days during which the premium remains due and unpaid. During the said month of grace, the unpaid premium with interest as above, remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance."

The applications were dated December 12, 1893, and contained, among other things, the following:

"Sum to be insured, $5000.

"Five policies of $1000 each.

"*Please date policy same as application.*" [It was averred in the complaint and found by the Circuit Court that these words in italics were inserted by the agent after the applications were signed and without applicant's knowledge.]

"Premium payable { Annually. ~~Semi-annually.~~ ~~Quarterly.~~

Note: Strike out the rates not desired.

"On what table { Ordinary Life. Life premium. Endowment payable in..... .....years. Limited endowment payable in.....years.

"I do hereby agree as follows: . . . 2. That inasmuch as only the officers at the home office of said company, in the City of New York, have authority to determine whether or not a policy shall issue on any application and as they act on the written statements and representations referred to, no statements, representations, promises or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, promises or information be reduced to writing and presented to the officers of said company, at the home office in this application. . . . 4. That any policy which

may be issued under this application shall not be in force, until the actual payment to and acceptance of the premium by said company, or an authorized agent, during my lifetime and good health."

Mr. Chief Justice FULLER delivered the opinion of the Court:

By the payment of the annual premiums in advance and the delivery of the policies, McMaster's life became insured in the sum of five thousand dollars.

The contracts were not assurances for a single year, with the privilege of renewal from year to year on payment of stipulated premiums, but were entire contracts for life, subject to forfeiture by failure to perform the condition subsequent of payment as provided; or to conversion in 1913 at the election of the assured. *Thompson* v. *Insurance Company*, 104 U. S. 252; *Insurance Company* v. *Statham*, 93 U. S. 30.

The contention of the company presented by its answer was that McMaster requested that the policies "should be issued, dated and take effect the same date as the application, namely, the 12th day of December, 1893;" that the policies were accordingly so issued; and that McMaster's acceptance of them estopped his representative from denying that date, or claiming that the request that the policies should be so dated was not made by him.

But the policies were not dated December 12, and were dated December 18, the day on which they were actually issued. The applications were in terms parts of the policies, and by them it was agreed that the policies, though issued, should not be in force until the actual payment and acceptance of the premiums. This was a provision intended to cover any time which might elapse between issue and delivery and payment. So that notwithstanding the premiums in this instance were not actually paid and received, and the policies delivered until December 26, it may be conceded that, and in accordance with the practice in such matters, the contracts of insurance commenced to run from December 18 rather than from December 26. They were certainly not in force on December 12, 1893. No controversy was raised as to fractions of a day, or the exclusion or inclusion of the first day, and it was conceded that payment on January 12, in one view, or on January 18, in the other, would have averted a forfeiture.

Assuming, however, that the alleged request was not made by McMaster; that it was not, at least literally, complied with; or that it was immaterial; the company insists that the policies expressly required payment of the annual premiums, subsequent to the first, (payable and paid on delivery,) on December 12 in each year, commencing with December 12, 1894; that McMaster in accepting them without objection became bound by this requirement, and could not plead ignorance thereof resulting

from not reading them when tendered; and that, therefore, these policies were properly forfeited January 12, 1895, being twelve months from December 12, 1893, with a month of grace added.

The applications were part of the policies, and from them it appeared, and was found by the Circuit Court, that McMaster applied for insurance "on the ordinary life table, the premium to be payable annually." He was solicited to insure by the company's agent, and might, according to the company's form which was used, have asked that the premiums be payable annually, semiannually or quarterly, but he chose that they should be payable annually, and that the rate of premium should be calculated on that basis by the ordinary life table. The company assented to this, and fixed the annual premium on each policy at 821, on payment of which, that is, payment in advance, the policy was to go into effect. The payments were made, and the insurance was put in force for McMaster's life, subject, it is true, to forfeiture for nonpayment of subsequent premiums, but forfeiture when? If within the first year, then the payment for that year did not secure the immunity from forfeiture during the year, which had been contracted and paid for.

But the company says that McMaster requested that the policies should go into effect on December 12, 1893, and that his representative is estopped from denying that that is the operation of the policies as framed and accepted, or that the second premiums matured December 12, 1894.

It was found from the evidence that after McMaster had signed the applications, and without his knowledge or assent, the agent of the company inserted therein: "Please date policy same as application;" and it was further found that when the policies were returned to Sioux City, and were taken by the company's agent to McMaster, he "asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him, and thereupon McMaster paid the agent the full first annual premium or the sum of twenty-one dollars on each policy, and without reading the policies he received them and placed them away."

We think the evidence of this unauthorized insertion and of what passed between the agent and McMaster when the policies were delivered, taken together, was admisssible on the question whether McMaster was bound by the provision that subsequent payments should be made on December 12, commencing with December 12, 1894, because requested by him, or because of negligence on his part in not reading the policies.

The applicable statutes of Iowa declared that "any person who shall hereafter solicit insurance or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding."

Each policy provided that after it had been in force for three months, "a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5% per annum for the number of days during which the premium remains due and unpaid. During the said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and, in the event of death during said month, this indebtedness will be deducted from the amount of the insurance." This was a month in addition to the period covered by premiums already paid.

McMaster was justified in assuming, and on the findings must be held to have assumed, that if he paid the first annual premium in full he would be entitled to one year's protection, and to one month of grace in addition, that is, to thirteen months' immunity from forfeiture. And the findings show that the company, by its agent, gave that meaning to the clause, and that McMaster was induced to apply for the insurance by reason of the protection he supposed would be thus obtained.

In *Insurance Company* v. *Chamberlain*, 132 U. S. 304, it was decided that a person procuring an application for life insurance in Iowa became by force of the statute the agent of the company in so doing, and could not be converted into the agent of the assured by any provision in the application

In that case the applicant was required to state whether he had any other insurance on his life. He was in fact a member of several cooperative associations, and therefore did have other insurance; but the soliciting agent of the company, to whom he stated the facts, believing that insurance of that kind was not insurance within the meaning of the question, wrote "No other" as the proper answer, at the same time assuring the applicant that it was such. And this court held that the company was bound by the interpretation put upon the question by its soliciting agent.

When, then, McMaster signed these applications he understood, and the company by its agent understood, that if the risks were accepted at the home office he would by paying one year's premium in full obtain contracts of insurance which could not be forfeited until after the expiration of thirteen months.

The company accepted the risks and issued the policies December 18, and they were delivered and the premiums paid December 26.

Bearing in mind that McMaster had made no request of the company in respect of antedating the policies and was ignorant of the interpolation of the agent, and ignorant in fact, and not informed or notified in any way, of the insertion of December 12 as the date for subsequent payments, he had the right to suppose that the policies accorded with the applications as they had left his hands, and that they secured to him on payment of the first annual premiums in advance immunity from forfeiture for thirteen months. And the agent assured him that this was so.

The situation being thus we are unable to concur in the view that McMaster's omission to read the policies, when delivered to him and payment of the premiums made, constituted such negligence as to estop plaintiff from denying that McMaster by accepting the policies agreed that the insurance might be forfeited within thirteen months from December 12, 1893. *Knights of Pythias* v. *Withers*, 177 U. S. 260, and cases cited; *Fitchmer* v. *Fidelity Mut. Fire Assoc.*, 103 Iowa, 279; *Hartford &c. Ins. Co.* v. *Cartier*, 89 Mich. 41.

On the other hand, can the company deny that McMaster obtained insurance which was not forfeitable for nonpayment of premiums within thirteen months after the first payment?

If it can, by reason of its own act, without McMaster's knowledge, actual, or legally imputable, then the company's conduct would have worked a fraud on McMaster in disappointing, without fault on his part, the object for which his money was paid. The motive of the agent to get a bonus for himself rather than to deceive McMaster is not material, as the result of his action would be the same. To permit the company to deny the acts and statements on which the transaction rested would produce the same injury to McMaster, no matter what the agent's motives.

But what is the proper construction of these contracts in respect of the asserted forfeiture? The company, although retaining the premiums paid and not offering to return them, contends that if McMaster was not bound by an agreement that the subsequent premiums should be paid on December 12, then that the minds of the parties had not met because it had not contracted except on the basis of payments so to be made, but the question still remains whether the right of recovery in this case is dependent on such payment on the 12th day of December, 1894, or within thirty days thereafter.

We are dealing purely with the question of forfeiture, and the rule is that if policies of insurance contain inconsistent provisions or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain rather than forfeit the contract. *Thompson* v. *Phenix Insurance Company*, 136 U. S. 287; *National Bank* v. *Insurance Company*, 95 U. S. 673.

Each of these policies recited that it was made in consideration of the written application therefor, which was made part thereof, and of the payment in advance of an annual premium of twenty-one dollars, "and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy."

Does this latter provision require payment of an annual premium during the year already secured from forfeiture by payment made in advance?

May not the words "in every year thereafter" mean in every year after the year, the premiums for which have been paid? Or, in every year after the current year from the date of the policy?

At all events, if the payment in advance was a payment which put in force a contract good for life, determinable by nonpayment of subsequent premiums, and this first payment was payment of the premiums for a year, could the requirement of payment of a second annual premium within that year be given greater effect than the right to cancel the policies from January 18, 1895, if such payment were not tendered until after the lapse of thirteen months from December 12, 1893?

To hold the insurance forfeitable for nonpayment of another premium within the year for which payment had already been fully made would be to contradict the legal effect under the applications and policies of the first annual payment. Clearly, such a construction is uncalled for, if the words "the twelfth day of December in every year thereafter" could be assumed to mean in every year after the year for which the premiums had been paid. But if not, taking all the provisions together, and granting that the words included December 12, 1894, nevertheless it would not follow that forfeiture could be availed of to cut short the thirteen months' immunity from December 18, 1893, as the premiums had already been paid up to December 18, 1894. And the company could not be allowed, on this record, by making the second premiums payable within the period covered by the payment of the first premium, to defeat the right to the month of grace which had been proffered as the inducement to the applications, and had been relied on as secured by the payment. If death had occurred on December 18, 1894, or between the twelfth and eighteenth, it is quite clear that recovery could have been had, and as the contracts were for life, and were not determinable, (at least for twenty years,) at a fixed date, but only by forfeiture, it appears to us that the applicable rules of construction forbid the denial of the month of grace in whole or in part.

It is worthy of remark that it was specifically provided that after the policies had been in force one full year they should become incontestable on any other ground than nonpayment of premiums, and we suppose it will not be contended that if any other ground of contest had existed and death had occurred between December 12 and December 18, 1894, the company would have been cut off from making its defense, because the policies had been in force "one full year" from December 12.

And if not in force until December 18, the date of actual issue, how can it be said that liability to forfeiture accrued before the twelve months had elapsed?

The truth is the policies were not in force until December 18, and as the premiums were to be paid annually, and were so paid in advance on delivery, the second payments were not demandable on December 12, 1894, as a condition of the continuance of the policies from the twelfth to the eighteenth. And as the policies could not be forfeited for non-payment during that time the month of grace could not be shortened by deducting the six days which belonged to McMaster of right.

In our opinion the payment of the first year's premiums made the policies nonforfeitable for the period of thirteen months, and inasmuch as the death of McMaster took place within that period, the alleged forfeiture furnished no defense to the action.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed, and the cause is remanded to the latter court with a direction to enter judgment for plaintiff in accordance with the eighteenth finding, with interest and costs.

Mr. Justice BREWER did not hear the argument and took no part in the decision.

True copy.

Test:

Clerk Supreme Court, U. S.